TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 445

THE UNITED STATES OF AMERICA [illegible] LOWE, RANSOM LOWE, BERTHA LOWE, [illegible] LOWE, MARY ROBBINS, ALBERT ROGERS, AND [illegible] JONES, HEIRS-AT-LAW OF SHERMAN JONES, DECEASED, PLAINTIFFS IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE [illegible] COLUMBIA.

FILED NOVEMBER [illegible], [illegible]

(22,415.)

(22,415.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 794.

THE UNITED STATES OF AMERICA *EX REL.* LILLIE LOWE, RANSOM LOWE, BERTHA LOWE, EVALINA LOWE, MARY ROBBINS, ALBERT ROGERS, AND DOLLIE JONES, HEIRS-AT-LAW OF SHERMAN JONES, DECEASED PLAINTIFFS IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1910.

In the Court of Appeals of the District of Columbia.

No. 2187.

THE UNITED STATES ex Rel. LILLIE LOWE et al., Appellants,
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

a Supreme Court of the District of Columbia.

No. 50255. At Law.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Petitioners,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed February 18, 1908.

In the Supreme Court of the District of Columbia.

50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, William J. Lowe, James H. Lowe, Albert Rogers, and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Your petitioners respectfully represent:

1. That they are citizens of the United States and citizens, mem-

2 bers and residents of the Cherokee Nation, in the Indian Territory, and Cherokee freedmen by blood and by virtue of their descent from former recognized slaves of the Cherokees prior to, at and after the commencement of the War of the Rebellion, except that your petitioner Dollie Jones is heir at law of Sherman Jones, deceased, who was a descendant of a former Cherokee freedman and sues as such heir at law. Your petitioners state that they bring this suit collectively instead of individually at the request of the respondent and under a stipulation and agreement that the same may be so brought to save multiplicity of suits.

2. That the respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia, and is an officer of the Government of the United States and Secretary of the Interior in said Government and is sued as such, having succeeded on March 5, 1907, as said Secretary of the Interior the Ethan A. Hitchcock, hereinafter mentioned.

3. That, as heretofore stated, respondent's immediate predecessor in office as Secretary of the Interior was Ethan A. Hitchcock, to whom as said Secretary of the Interior was committed by Congress under certain laws hereinafter referred to the duty of final action on applications for citizenship in the Five Civilized Tribes in the Indian Territory and of approving the enrollment of those applicants whom he should deem entitled to be placed on the final rolls of members or citizens of any one of the Five Civilized Tribes or Nations, the Cherokee tribe or Nation being one of the said Five Civilized Tribes.

4. That by certain treaties and agreements between the United States and the Cherokee Nation of Indians the Cherokee Nation ceded to the United States the lands guaranteed to it by treaties with the United States east of their present home in exchange for the lands whereon said nation now resides and by Article I of the treaty between the United States and the Cherokee Nation proclaimed August 17, 1846, (9 Stats. at Large) the lands whereon said Cherokee Nation now resides and in which lands your petitioners have been given allotments as their share of the lands of said tribe or nation were ceded by the United States to the Cherokee Nation in fee simple, said Article I being as follows:

"Article I. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eight, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, Always,

That such lands shall revert to the United States if the Indians become extinct or abandon the same."

3 That your petitioners are entitled to the benefits of the aforesaid Article I of the said Cherokee treaty proclaimed August 17, 1846, by virtue of a treaty between the United States and the Cherokee Nation of Indians proclaimed August 11, 1867, (14 Stats. 799) whereby former slaves of the Cherokee Nation as your petitioners are advised were granted all the rights of native Cherokees, the same rights being granted free persons of color, as your petitioners are advised, provided they were in the Cherokee Nation at the commencement of the War of the Rebellion and either continued in or returned to the Cherokee Nation before February 11, 1867. The provisions of said treaty proclaimed August 11, 1867, conferring equal rights with native Cherokees on your petitioners are as follows:

"Article IV. All the Cherokees and freed persons who were formerly slaves to any Cherokees, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, 1861, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, etc."

"Article IX. The Cherokee Nation having, voluntarily, in February, 1863, by an act of the National Council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee Nation, shall never receive any compensation or pay for the slaves so emancipated."

That this difference between former slaves and free persons of color was made in the treaty aforesaid by the commissioners negotiating the same, as shown by the records, because of the Cherokees' expressed willingness to provide homes and grant tribal rights to their former slaves, whose identification by them was easy and certain, but their unwillingness that the Cherokee country might be overrun from time to time by the negroes of adjoining states attracted by the opportunity to share in the lands and funds of the Cherokee Nation and claiming to be free persons of color who had formerly resided in the Cherokee Nation in the days of the War of the Rebellion, the Cherokee Nation having no means of refuting such claims as in the case of former slaves.

5. That said Indians and freedmen and their heirs have not become extinct and have not abandoned the said land or any part thereof; that the reversionary interest of the United States in said

4 lands has been otherwise terminated and surrendered to said Indians, freedmen, and returning free persons of color by the Acts of Congress, treaties and agreements herein mentioned; that your petitioner is and likewise has been long recognized by the Cherokee Nation as a Cherokee freedman citizen or member of said tribe; that your petitioner as one of those referred to in the said treaties proclaimed in 1846 and 1866 was entitled prior to allotment as hereinafter mentioned to an equal undivided interest in the whole of the lands of the Cherokee Nation after certain lands were duly and lawfully reserved for town site, charitable and certain specified purposes in accordance with Acts of Congress and agreements duly entered into and approved and ratified by the nations, parties thereto, between the United States and the Cherokee Nation; and is now the owner of and is possessed in vested right of a lawful allotment of land in the Cherokee Nation and is further entitled to an equal undivided distributive share in the funds and surplus lands of the Cherokee Nation after allotments, as hereinafter referred to, are made to all the duly enrolled members of the Cherokee Nation.

6. That under the provisions of various acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of making agreements with each of the Five Civilized Tribes for the division in severalty among their citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of each and every one of the Five Civilized Tribes and of allotting in severalty in fee simple to the members of the Cherokee Nation the lands held by said nation as above set forth. That under the provisions of said Acts of Congress, of agreements effected in accordance therewith, and of treaties between the United States and said Indian tribes rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior his name should be placed on the final roll of said tribe, and he thereby should become and be a member of the said tribe or nation and entitled to an allotment, in the Cherokee Nation, of 40 acres of average allottable land in said nation, and to the other rights and privileges common to citizens of said nation.

That by the Act of June 10, 1896, (29 Stat., 321, 329) it was provided:

"that the rolls of citizenship of the several tribes as now existing are hereby confirmed"

and that either the Commission to the Five Civilized Tribes or the legally constituted court or committee on citizenship of the several tribes should determine, after hearing, the applications of persons claiming right to be admitted and enrolled in the several nations, either the tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes to have

the right of appeal within a limited time from such decision
5 to the United States district court, whose decision should be final, and the rolls thus prepared it was provided—

"shall be, and are hereby, made rolls of citizenship of said nations or tribes,"

and should be filed with the Commissioner of Indian Affairs—

"to remain there for use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897, (30 Stat., 62, 84), it was provided that the words "rolls of citizenship" as used in the act of June 10, 1896,

"shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly constituted courts thereof, or the commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the act be stricken from the rolls—

"where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation,"

provided, however, that the person so stricken from the rolls should have a right of appeal to the United States district court.

That by the Act of June 23, 1898, (30 Stat., 495-503) it was provided:

"It (the Dawes Commission) shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, 1896.

* * * * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent."

That by the Act of May 31, 1900 (31 Stat., 221-236), it was provided that the commission—

"shall not receive, consider, or make any record of any application of any persons for enrollment as a member of any tribe of the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901, (31 Stat., 1058-1077) it was provided—

"the rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final,
6 and the persons whose names are found thereon shall alone constitute the several tribes which they represent"

and the Secretary of the Interior was directed to fix a time by agreement or otherwise,

"for closing said rolls, after which no name shall be added thereto."

That by the Act of July 1, 1902 (32 Stat., 641), ratifying an agreement between the United States and the Cherokee Nation it was provided that the rolls of citizenship of Cherokee citizens should be made in strict compliance with the Acts of Congress approved June 28, 1898, and May 31, 1900, aforesaid.

By Section 25 of said agreement it was provided:

"The roll of citizens of the Cherokee Nation shall be made as of September first, 1902, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

By Section 29 of said agreement it was provided:

"For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The rolls so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes."

By Section 31, it was provided:

"No person whose name does not appear upon the roll as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

By Section 20, it was provided:

"If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs."

That by the Act of April 21, 1904, (33 Stat., 189-204) it was provided that the Commission to the Five Civilized Tribes should

conclude its work on or before July 1, 1905, and cease thereafter to exist.

7 That by the Act of March 3, 1905, (33 Stat., 1048-50), it was provided that the Secretary of the Interior should complete the unfinished business of the Commission to the Five Civilized Tribes and there was conferred on him all the powers heretofore granted to the said commission.

That by the Act of April 26, 1906, (34 Stat., 137) it was provided that no person should be enrolled unless application for enrollment was made prior to December 1, 1905, and the rolls of citizenship were required to be completed by March 4, 1907.

7. That prior to November 16, 1904, the Secretary of the Interior affirmed a decision by the Commissioner to the Five Civilized Tribes holding that petitioners, except those hereinafter designated as "new borns," were entitled to enrollment as freedmen citizens or members of the Cherokee tribe or nation of Indians and after a full and careful inquiry into the rights of petitioners and of the record in the case, the names of petitioners were, prior to November 16, 1904, duly and regularly ordered placed on the final roll of freedmen citizens of the Cherokee Nation and thereafter a final roll of freedmen citizens of the Cherokee Nation containing the names of your petitioners as freedmen citizens of the Cherokee Nation was duly and regularly approved by the lawful incumbent of the office of the Secretary of the Interior, the names of your petitioners being duly entered and appearing on the regularly authenticated and approved final rolls of freedmen citizens of the Cherokee Nation as follows:

Cherokee Freedmen Roll.

No.	Name.	Age.	Sex.	Blood.	Cen. card No.
3280	Robbins, Mary	51	F	....	389
3282	Jones, Sherman	1	M	....	389
	* * * *	*	*	*	
3286	Rogers, Albert	24	M	....	397
3287	Lowe, Lillie	27	F	....	398
3288	Lowe, Ransom	4	M	....	398
3289	Lowe, Evalina	2	F	....	398
3290	Lowe, Bertha	1	F	....	398

That said final rolls were, on, to wit, the 16th day of November, 1906, duly and regularly approved by the then lawful incumbent of the office of the Secretary of the Interior as is evidenced by the following genuine and regular notation at the bottom of said approved final roll:

Cherokee Freedmen Roll.
L. R. S.
Department of the Interior, Washington, D. C., Nov. 16, 1904.
Approved:
THOMAS RYAN,
Acting Secretary.

8 That your petitioners William J. Lowe and James H. Lowe are children of Lillie Lowe aforesaid and are entitled to enrollment as "new borns" under the Act of Congress approved April 26, 1906, section two of said Act reading as follows, and your petitioner through her mother Lillie Lowe having complied with the provisions of the same:

"SECTION 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee or Creek Tribes, or have applications for enrollment pending at the approval hereof, and allotments may be made to children so enrolled."

8. That prior to the time when, as will appear hereinafter, your petitioners' names were stricken from or attempted to be stricken from the final rolls of freedmen citizens of the Cherokee Nation, as will appear hereinafter, your petitioners, except William J. Lowe and James H. Lowe, duly and regularly selected an allotment of 110 acres each of average allottable lands of the Cherokee Nation and after the names of your petitioners had been duly and regularly placed on the final approved rolls of freedmen citizens of the Cherokee Nation allotment certificates were duly and regularly issued to your petitioners for the lands so selected by them by the Commission to the Five Civilized Tribes and are now held by them as conclusive evidence of the right of your petitioners to the lands so selected by them and described in the allotment certificate aforesaid. That the statutes made and provided under which your petitioners selected the allotment referred to and allotment certificates were issued to them provide:

Act of July 1, 1902.

"SECTION 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his allotment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

"SECTION 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SECTION 14. Lands allotted to citizens shall not in any manner

whatever or at any time be encumbered, taken, or sold to
9 secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

"SECTION 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

"SECTION 16. If for any reason any allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

"SECTION 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SECTION 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

"SECTION 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor."

9. That after the issuance to your petitioners of said allotment certificates the Secretary of the Interior, predecessor in office of respondent, arbitrarily and illegally undertook to deprive your petitioners of the rights by law vested in them and without lawful right or power so to do struck or attempted to strike the names of your petitioners from the aforesaid final approved rolls of Cherokee freedmen by the mutilation of said rolls as follows: A line drawn through the names of each of your petitioners thus ([Lillie Lowe]* and the writing after said names of the following in each and every instance, "Canceled March 4, 1907, See —— —, 1907." That it was found and admitted by the Secretary of the Interior when and at the time he so illegally acted or attempted to act in cancelling the names of your petitioners from the final approved Cherokee Freedmen Rolls that your petitioners each and all were the descendants of former Cherokee slaves who had been liberated by voluntary act of their former owners or by law as a consequence of and during the period of the War of the Rebellion but your petitioners are informed and believe and so state that this action in cancelling the names of your petitioners was taken upon the ground that your petitioners or those former Cherokee slaves from whom they had descended had

[* Words enclosed in brackets erased in copy.]

not returned to the Cherokee Nation prior to February 11,
10 1867. Your petitioners aver that their ancestors as matter of fact did return and were within the Cherokee Nation on and prior to February 11, 1867, but your petitioners further allege that they were not by the aforesaid treaty of 1866 or any other law or treaty required to have returned to the Cherokee Nation prior to February 11, 1867, their ancestors having been Cherokee slaves when the War of the Rebellion broke out, and that the cancellation of the names of your petitioners was illegally and arbitrarily ordered by the Secretary of the Interior because of an erroneous construction of the aforesaid treaty of 1866 whereby it was held former slaves were required to return within the six months' period of limitation fixed by said treaty for the return of free persons of color and also because of a usurpation by the Secretary of the Interior of the authority and power to strike from or cancel names on the final approved rolls of the Five Civilized Tribes. A true copy of the order of the Secretary of the Interior directing the cancellation of the enrollment of your petitioners and of the report of the Commission to the Five Civilized Tribes on which said order was issued is attached hereto marked "Petitioner's Exhibit A-1" and is prayed to be made a part hereof as though incorporated herein.

Your petitioners further allege that the respondent herein or his predecessor in office has canceled the allotments of your petitioners herein referred to and has permitted other persons to file on the lands of your petitioners as allotments of said other persons and the rights and titles of your petitioners to the lands to be thereby impaired.

Your petitioners on information and belief aver the changes set forth above in the rolls were not noted prior to March 4, 1907, on all four of the rolls required by law to be made and deposited as provided by the Act of July 1, 1902, *supra*, and demands that respondent state on which of said rolls these changes were noted prior to March 4th last. Your petitioner further avers that since March 4, 1907, the said rolls, contrary to law, have been changed and mutilated so as to have the cancellation of the names of each and all of your petitioners noted thereon.

10. Your petitioners on information and belief aver that the true present value of the allotments selected by each of your petitioners and to which each of your petitioners has been issued an allotment certificate, together with the share of each of your petitioners in the funds and surplus lands of the Cherokee Nation after all lawful members have been given their lawful share therein is in excess of five thousand dollars.

11. Your petitioners further state that they have made demand on the respondent as Secretary of the Interior that he cause the line run through petitioners' names to be erased and the notation placed opposite and above the names of your petitioners to be erased and to restore your petitioners to the rolls of citizens by blood of the Cherokee Nation as fully as they were thereon prior to the hereinbefore mentioned illegal and arbitrary act of respondent's predecessor in office in striking or attempting to strike petitioners' names therefrom

and to refuse to permit other persons to file on the same as part of their allotment or to drill for oil thereon without your petitioners' assent and authority, but respondent has refused and neglected so to do, and on the contrary, as your petitioners are informed and believe, holds that petitioners are not enrolled citizens of the Cherokee Nation nor entitled to share in its lands and funds and will be required to surrender the land allotted to them to any others who may legally file thereon and to permit the same to be denuded of any oil therein.

Wherefore, inasmuch as the Honorable James Rudolph Garfield, Secretary of the Interior, has refused to restore your petitioners to the approved rolls of members or citizens by blood of the Cherokee Nation, to remove the cloud placed by his predecessor in office on your petitioners' rights, claims and demands as enrolled citizens or members of the Cherokee Nation, to recognize your petitioners as lawfully enrolled citizens or members of said nation, and to refuse to permit other persons to take the lands of your petitioners in allotment and to drill for oil therein without your petitioners' authority and as the law provides no other adequate remedy in the premises whereby your petitioners can be protected in their lawful rights whereof they are now unjustly and arbitrarily deprived, your petitioners pray:

1. That a writ of mandamus may be issued and directed to the Honorable James Rudolph Garfield, Secretary of the Interior, commanding him to erase or cause to be erased the marks or notations made on the approved rolls of the freedmen members of the Cherokee Nation in derogation of the rights or claims of your petitioners as duly and lawfully enrolled freedmen citizens or members of said nation, to restore your petitioners to full and lawful enrollment as freedmen citizens or members in said Cherokee Nation, to recognize your petitioners as lawful citizens or members of said Cherokee Nation with all the rights and privileges thereunto appertaining and to refuse to permit any other person to take or hold in allotment the lands allotted to your petitioners.

2. For such other and further right or rights or relief as to the Court may seem proper and the nature of your petitioners' case may require.

And as in duty bound, your petitioners will ever pray.

LILLIE LOWE, *Petitioner.*

KAPPLER & MERILLAT,
JAMES K. JONES,
Att'ys for Petitioners.

STATE OF OKLAHOMA,
County of Creek, ss:

Before the subscriber, a Notary Public in and for the State of Oklahoma, County of Creek, on the 7th day of Feb'y, A. D. 1908, personally appeared Lilley Lowe, who made oath on the Holy Evangels of Almighty God that she is the within petitioner, that she has read the petition subscribed and knows the contents thereof, and

that the facts set forth in said petition are true to the best of deponent's knowledge and belief.

LILLIE LOWE.

12 Subscribed and sworn to before me this 7th day of Feb'y, A. D. 1908.

[SEAL.] A. H. PURDY,
Notary Public.

My com. exp. July 30th, 1910.

DEPARTMENT OF THE INTERIOR,
ITD 3388-07. WASHINGTON, *March* 4, 1908.
Direct.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In accordance with the recommendation of the Indian Office of February 14, 1907 (Land 106, 811-06), copy whereof is enclosed, your decision of December 3, 1906, denying the application for the enrollment of Mary Robbins, Dollie Jones, Sherman Jones, Lillie Lowe, Ransom Lowe, Evalina Lowe, Bertha Lowe and Albert Rogers and James Rogers, is hereby affirmed, and the Department in pursuance thereof has hereby canceled the names of Mary Robbins, Dollie Rogers, Sherman Jones, Albert Rogers, Lillie Lowe, Ransom Lowe, Evalina Lowe and Bertha Lowe from the approved roll of November 16, 1904, of Cherokee Freedmen opposite numbers 3280, 3281, 3282, 3286, 3287, 3288, 3289 and 3290, respectively.

You will take similar action upon the partial roll in your possession, and the Indian Office has this day been directed to take similar action.

The record in the case has been returned for the files of the Indian Office, together with copy hereof.

Respectfully, JESSE E. WILSON,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, I. T., *June* 30, 1905.

The Honorable, the Secretary of the Interior.

SIR: There is herewith transmitted the record of proceedings had in the matter of the application for the enrollment of James Rogers as a Cherokee Freedmen, including the Commission's decision dated June 30, 1905, rejecting said applicant.

In connection with the Commission's decision in this case your attention is invited to the cases of Mary Robbins et al., Cherokee Freedman, 389, Albert Rogers, Cherokee Freedman, 397 and Lillie Lowe et al., Cherokee Freedmen, 398 in which among other applicants are included the mother and full brother and sister of the applicant herein, James Rogers, and who on March 5, 1904, were granted enrollment as Cherokee Freedmen by the Commission, and no protest to its action having been made by the attorneys for the

Cherokee Nation, their names were included in the partial roll of Cherokee Freedmen approved by the Secretary of the Interior on November 16, 1904, opposite numbers 3280, 3286 and 3287, respectively.

13 The evidence in these cases shows that the said Mary Robbins is the ancestor of all the other applicants included in said cases, and it is by virtue of her compliance with the treaty stipulations of 1866 that the other applicants and the applicant herein James Rogers, all of whom were born since 1866 and who possessed no other right to citizenship, claim the right to enrollment as Cherokee Freedmen.

Certain evidence introduced by the Cherokee Nation in the case now forwarded to the Department for review, and which through oversight was not made a part of the record and considered in said cases of Mary Robbins et al., Albert Rogers and Lillie Lowe et al., shows to the satisfaction of the Commission that the said Mary Robbins did not comply with the stipulations of the treaty of 1866.

If the decision of the Commission in this case is affirmed by the Department, it is respectfully recommended that the names of Mary Robbins, Dollie Rogers, Sherman Jones, Albert Rogers, Lillie Lowe, Ransom Lowe, Evalina Lowe and Bertha Lowe appear upon the final roll of Cherokee Freedmen approved by the Secretary on November 16, 1904, opposite numbers 3280 to 3282, inclusive, and 3286 to 3290, inclusive, be stricken from the rolls, and that if deemed proper by the Department, the application for the enrollment of the above-named persons be reopened and remanded to the Commission for readjudication in the light of the testimony offered in the case herewith transmitted.

Respectfully,

TAMS BIXBY, *Chairman.*
T. B. NEEDLES.
C. R. BRECKENRIDGE.

Rule to Show Cause.

Filed February 18, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE et al.
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

On consideration of the petition for the writ of mandamus filed in the above entitled cause, it is by the Court this 18th day of February, 1908, Ordered that the respondent James Rudolph Garfield show cause on or before the 28 day of February, 1908, why the writ of mandamus should not issue as prayed.

WRIGHT, *Justice.*

Marshal's Return.

Served copy of within Rule and copy of petition in this cause on respondent Feb'y 18, 1908.

AULICK PALMER, *Marshal.*
S.

14 *Answer.*

Filed March 19, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, William J. Lowe, James H. Lowe, Albert Rogers, and Dollie Jones, Heir at Law of Sherman Jones, Deceased, Petitioners,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Respondent, for answer to the rule to show cause why a writ of mandamus should not issue against him as prayed in the petition filed herein and to said petition, says:

1. That he does not admit that the relators, or any of them, are citizens of the United States and denies that they, or any of them, are citizens or members of the Cherokee Nation, although he admits that they are descended from former Cherokee slaves.

2. Respondent admits the allegations of the second paragraph of the petition.

3. Respondent admits the allegations of paragraph 3 of the petition.

4. Respondent denies that the relators, or any of them, are entitled to the benefits of Article I of the treaty between the United States and the Cherokee Nation, proclaimed August 17, 1846 (9 Stat., 871), by virtue of the treaty between the United States and the Cherokee Nation, proclaimed August 11, 1866 (14 Stat., 799), because the ancestor of said relators, under whom they claimed to be entitled to be enrolled as freedmen members of the Cherokee Nation, for allotment purposes, namely, one Mary Rogers or Mary Robbins, a former Cherokee slave, was not a resident of the Cherokee Nation at the time of the proclamation of the latter treaty and did not return to the said Nation as required by law.

5. Respondent admits that the Cherokee Indians and freedmen and their heirs have not become extinct and have not abandoned the lands granted to them, but denies that the relators, or any of them, are recognized members or citizens of the Cherokee Nation, or that they, or any of them, were entitled under said treaties of 1846 and 1866 to any interest in the land of the Cherokee Nation, and that

they, or any of them, are the owners of or possessed in vested right of a lawful allotment of land in the Cherokee Nation or are entitled to a distributive share in the funds and surplus lands of the Cherokee Nation after allotments have been made to the duly enrolled members of said Nation.

6. Respondent admits that provision was made for the enrollment of members of the Five Civilized Tribes in the Indian Territory, including the Cherokee Nation, for the purpose of allotting the lands of said tribes in severalty, as set forth in the several acts referred to in the 6th paragraph of said petition.

7. Respondent admits that on November 16, 1904, the Acting Secretary of the Interior approved a partial list of freedmen members of the Cherokee Nation, which contained the names of Mary Robbins, Sherman Jones, Albert Rogers, Lillie Lowe, Ransom Lowe, Evalina Lowe and Bertha Lowe, said persons having been adjudged by the Commission to the Five Civilized Tribes, upon applications duly made by them or on their behalf, to be entitled to be enrolled as freedmen members of the Cherokee Nation, said Commission having found upon the hearing had upon such applications that the principal applicant, Mary Robbins, through whom the others claimed to be entitled to be enrolled, "was the slave of a Cherokee citizen at the commencement of the rebellion; that she was taken to Kansas during the rebellion, but returned to the Cherokee Nation within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc. vs. The Cherokee Nation et al., for the return of Freedmen to said nation."

But respondent further says that thereafter and within the time fixed by the Act of Congress of April 26, 1906 (34 Stat., 137), for the completion of the rolls of the Five Civilized Tribes, to wit, March 4, 1907, his predecessor disapproved the enrollment of said persons and struck their names from said partial list, for the reasons and in the manner set forth in paragraph 9 of this answer.

Respondent further says that the relators, William J. Lowe and James H. Lowe, children of Lillie Lowe, who claim to be entitled to an enrollment as "new borns" under the Act of Congress, approved April 26, 1906, Section 2 (34 Stat., 137), were never enrolled by or under authority of his predecessor as members, freedmen or otherwise, of the Cherokee Nation, but that the applications for their enrollment were severally denied by the Commissioner to the Five Civilized Tribes on February 23, 1907, whose action thereon was subsequently approved by the Secretary of the Interior.

8. Respondent admits that after said approval by the Acting Secretary of the Interior of said partial list containing the names of certain of said relators, allotment certificates were issued to them for lands selected by them as their allotments, but avers that thereafter, and for the reasons stated in paragraph 9 of this answer, said allotment certificates were cancelled and other persons allowed to file on certain of said lands. Respondent further says that no patents were ever issued or recorded for any of said lands.

9. Respondent says that after said approval by the Acting Secre-

tary of the Interior of the partial list of freedmen members of the Cherokee Nation, containing the names of certain of said relators, referred to in paragraph 7 of this answer, and on June 30, 1905, the Commission to the Five Civilized Tribes rendered its decision upon the application for enrollment as a Cherokee freedman of one James Rogers, who was shown by the evidence submitted upon the hearing of such application to be a son of said Mary Robbins, or Mary Rogers, whose enrollment had been approved as aforesaid; that the right of said James Rogers to be enrolled depended upon whether his mother, said Mary Robbins or Mary Rogers, had returned to the Cherokee Nation, within the time specified by said decree of the Court of Claims rendered February 3, 1896, her father being a non-citizen of the Cherokee Nation; that said Commission found from the evidence adduced at the hearing of the application of said James Rogers that said Mary Robbins or Mary Rogers did not return to and establish her residence in the Cherokee Nation within the time specified in said decree, and therefore denied his said application; that subsequently, to wit, July 19, 1906, the Secretary of the Interior, by Jesse E. Wilson, Assistant Secretary, set aside said decision of the Commission to the Five Civilized Tribes of June 30, 1905, denying the application for enrollment as a Cherokee freedman of James Rogers and directed a rehearing therein, and at the same time and in the same order the Commissioner to the Five Civilized Tribes was directed to rehear and readjudicate the applications for enrollment of said Mary Robbins and her descendants whose enrollment had been approved as aforesaid, said Commissioner being directed to consolidate all of said applications on said rehearing and readjudication; that thereafter, and within the time fixed by law for the completion of the rolls of the Five Civilized Tribes, a rehearing of said consolidated applications was had by the Commissioner to the Five Civilized Tribes, after due notice to all the parties concerned, and at which hearing they appeared, either in person or by counsel or both; and that upon said hearing the Commissioner to the Five Civilized Tribes rendered a decision, dated December 3, 1906, holding that the evidence submitted thereon showed that the principal applicant, Mary Robbins, "was the slave of a Cherokee citizen at the commencement of the War of the Rebellion; that during the progress of said Rebellion she left the Cherokee Nation and did not return thereto and establish an actual, personal bona fide residence in the Cherokee Nation within the time specified in the decree of the Court of Claims rendered February 3, 1896, in the case of Moses Whitmire, trustee, etc., vs. The Cherokee Nation, et al., as provided by paragraph 2 of Section 3 of the Act of Congress approved April 26, 1906 (34 Stat., 137), for the return of freedmen to said nation." Said Commissioner further found that the evidence showed that all the other applicants were descendants of said Mary Robbins, born since 1866, and neither claimed nor possessed any rights to enrollment as Cherokee freedmen other than as such descendants, and that, excepting the Kern-Clifton roll, none of the applicants could be identified on any roll of the Cherokee Nation in the possession of his office. It

16

was therefore ordered and adjudged by said Commissioner that under the provisions of Section 21 of the Act of Congress, approved June 28, 1898 (30 Stat., 495), said applicants were not entitled to enrollment as Cherokee freedmen, and their applications for enrollment as such were severally denied. A copy of said decision marked Exhibit "A" is attached hereto and prayed to be taken as a part hereof.

17 Respondent further says that the Acting Secretary of the Interior, by an order made on March 4, 1907, affirmed said decision of the Commissioner to the Five Civilized Tribes of December 3, 1906, and thereby cancelled the names of said persons, including the relators, from said partial list approved as aforesaid. A copy of said order of March 4, 1907, marked Exhibit "B" is attached hereto and prayed to be taken as a part hereof. By said order the Commissioner of the Five Civilized Tribes was directed to take similar action upon the partial roll in his possession. The Commissioner of Indian Affairs was also directed on the same day to take similar action upon the roll in his possession. Copies of said partial lists or rolls in the custody of the Secretary of the Interior and of the Commissioner of Indian Affairs, marked Exhibits "C" and "D" are attached hereto and prayed to be taken as a part hereof.

Respondent says he is unable to state whether the marks of cancellation made upon said partial list in his possession were made prior to the expiration of March 4, 1907, owing to the great number of cancellations made on that and the succeeding day. He further says that the names of said relators upon the copies of said partial lists in the possession of said Commissioner of Indian Affairs and the Commissioner to the Five Civilized Tribes could not in the ordinary course of events have been actually cancelled in pursuance of his order of March 4, 1907, until after that date.

Respondent further says that the action of his predecessor, in reopening and readjudicating the cases of said relators, whose enrollment had been approved as aforesaid, and in striking their names from said approved partial list as aforesaid, was in accordance with his long established and well recognized practice, extending from the time the Act of Congress of July 1, 1902, (34 Stat., 137), relating to the allotment of lands in the Cherokee Nation became operative until the close of March 4, 1907, the date fixed by the Act of April 26, 1906 (34 Stat., 137), for the completion of the rolls of the Five Civilized Tribes, his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, having struck several hundred names from said approved rolls during that time, because they had been found to have been unlawfully or improperly enrolled.

10. Respondent says that he is not advised as to the value of the lands and moneys claimed by said relators.

11. Respondent admits that said relators made demand that respondent restore their names to the rolls and that he refused so to do.

Further answering, respondent says that by the Act of Congress of April 26, 1906 (34 Stat., 137), the rolls of members of the Cherokee Nation were required to be fully completed on March 4, 1907, and

the Secretary of the Interior was denied authority to approve the enrollment of any person after that date.

Respondent further says that the matters sought to be controlled by said petition relate to the allotment of land in severalty in the Cherokee Nation, and that by the legislation of Congress and the agreements of the United States with said nation exclusive jurisdiction of all matters relating to the allotment of lands in sev-
18 eralty in said nation was originally conferred upon the Commission to the Five Civilized Tribes under the supervision and direction of the Secretary of the Interior and is now devolved exclusively upon the Secretary of the Interior.

Respondent further says that the matter sought to be controlled by the Commission involve- the exercise of judgment and discretion on the part of the Secretary of the Interior.

Respondent further says that this court has no jurisdiction of the subject matter of this action.

Wherefore respondent prays that the rule against him be discharged and the petition dismissed at the cost of relators.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior, Respondent.

EDWARD T. SANFORD,
Assistant Attorney General,
WILLIAM R. HARR,
Special Assistant Attorney General,
DANIEL W. BAKER,
United States Attorney, for Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

James Rudolph Garfield, being duly sworn, deposes and says: that he is the Respondent in the above entitled case; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated on information and *application* he believes to be true.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn before me this 17th day of March, 1908.
[SEAL.] EDW'D B. FOX,
Notary Public, D. C.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the Matter of the Application for the Enrollment of MARY ROBBINS et al. as Cherokee Freedmen, Consolidating the Applications of:

Mary Robbins, et al.	Cherokee Freedmen 389.
Lillie Lowe, et al.	Cherokee Freedmen 398.
Albert Rogers	Cherokee Freedman 397.
James Rogers	Cherokee Freedman D60.

19 *Decision.*

The records of this office show: That applications for enrollment as Cherokee freedmen were made to the Commission to the Five Civilized Tribes by Mary Robbins for herself and minor grandchild, Dollie Rogers, who, prior to September 1, 1902, was married to one Will Jones, and will now be listed for enrollment as Dollie Jones; thereafter on August 30, 1902, there was filed with the Commission to the Five Civilized Tribes an affidavit showing the birth, on December 12, 1901, of Sherman Jones, son of the applicant, Dollie Jones; by Lillie Lowe for herself and minor children, Ransom and Evalina Lowe; thereafter on August 30, 1902, there was filed with the Commission to the Five Civilized Tribes an affidavit showing the birth, on March 29, 1902, of Bertha Lowe, child of the applicant, Lillie Lowe; by Albert Rogers for himself, and by James Rogers for himself. The records further show that on March 5, 1904, the Commission to the Five Civilized Tribes rendered its decision herein, granting the application for the enrollment of Mary Robbins, Dollie Jones (Rogers), Sherman Jones, Lillie Lowe, Ransom Lowe, Evalina Lowe, Bertha Lowe and Albert Rogers as Cherokee freedmen, and that their names are included in a partial roll of freedmen citizens of the Cherokee Nation approved by the Secretary of the Interior November 16, 1904, opposite Nos. 3280, 3281, 3282, 3287, 3288, 3289, 3290 and 3286, respectively, and that on June 30, 1905, said Commission rendered its decision herein, denying the said James Rogers the right to enrollment as a Cherokee freedman, which decision was, on same date, duly forwarded the Secretary of the Interior for his review and decision. Thereafter on July 19, 1906 (I. T. D. 9862-05, 7502-06), a motion to reopen the case of James Rogers, having been filed in behalf of said applicant, the Department remanded his case to this office with instructions to notify the applicant, James Rogers, that he would be required to establish when and where he was born in the Cherokee Nation, and also to introduce testimony to determine whether Mary Robbins, formerly Mary Rogers, his mother, did return to the Cherokee Nation prior to February 11, 1867. Said Departmental letter directed this office to consolidate on the rehearing and readjudication of the case of James Rogers, Cherokee freedman D 60, the cases of Mary Robbins, et al., Cherokee freedmen 289, Albert Rogers, Cherokee freedman 397 and Lillie Lowe, et al., Cherokee freedmen 398. Further proceedings in the matter of said applications were had at Melvin, Indian Territory, October 10, and at Muskogee, Indian Territory, October 11, 1906.

The evidence in this case shows: That the principal applicant herein, Mary Robbins, was the slave of a Cherokee citizen at the commencement of the war of the rebellion; that during the progress of said rebellion she left the Cherokee Nation and did not return thereto and establish an actual personal bona fide residence in the Cherokee Nation within the time specified in the decree of the Court of Claims rendered February 3, 1896, in the case of Moses Whit-

mire, trustee, etc., vs. The Cherokee Nation, et al., as provided
20 by paragraph two of Section three of the Act of Congress approved April 26, 1906 (34 Stat., 137), for the return of freedmen to said Nation. The evidence further shows that all the other applicants herein are descendants of the said Mary Robbins, born since 1866, and neither claim nor possess any rights to enrollment as Cherokee freedmen other than as such descendants. Excepting the Kern-Clifton roll, none of the applicants herein can be identified on any roll of the Cherokee Nation in the possession of this office.

It is, therefore, ordered and adjudged: That under the provisions of Section twenty-one of the Act of Congress approved June 28, 1898, (30 Stat., 495), Mary Robbins, Dollie Jones, Sherman Jones, Lillie Lowe, Ransom Lowe, Evalina Lowe, Bertha Lowe, Albert Rogers and James Rogers are not entitled to enrollment as Cherokee freedmen and their applications for enrollment as such are accordingly denied.

Dated at Muskogee, Indian Territory, this Dec. 3, 1906.

(Signed) TAMS BIXBY,
Commissioner.

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR, G. R.
WASHINGTON, *March* 4, 1907. W. H. M.

I. T. D. 3388-1907.
L. R. S.
Direct.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In accordance with the recommendation of the Indian Office of February 14, 1907 (Land 106811-1906), copy whereof is enclosed, your decision of December 3, 1906, denying the application for the enrollment of Mary Robbins, Dollie Jones, Sherman Jones, Lillie Lowe, Ransom Lowe, Evalina Lowe, Bertha Lowe and Albert Rogers, and James Rogers, is hereby affirmed, and the Department, in pursuance thereof, has hereby cancelled the names of Mary Rogers, Dollie Rogers, Sherman Jones, Albert Rogers, Lillie Jones, Ransom Lowe, Evalina Lowe and Bertha Lowe, from the approved roll of November 16, 1904, of Cherokee freedmen, opposite numbers 3280, 3281, 3282, 3286, 3287, 3288, 3289, 3290, respectively.

You will take similar action upon the partial roll in your possession, and the Indian Office has this day been directed to take similar action.

The record in the case has been returned for the files of the Indian Office, together with copy hereof.

Respectfully, JESSE E. WILSON,
Acting Secretary.

1 enclosure, and
6 enclo., with copy hereof to I. O.

21 EXHIBIT "C."

Cherokee Freedmen Roll.

No.	Name.	Age.	Sex.	Census card No.
*	* * * * *	*	*	
	Cancelled March 4/07. 328 p. c. 251			
[3280	Robbins, Mary	51	F	389]*
	Cancelled March 4/07. 328 p. c. 512			
[3281	Rogers, Dollie	16	F	389]*
	Cancelled March 4/07. 328 p. c. 251			
[3282	Jones, Sherman	1	M	389]*
*	* * * * *	*	*	
	Cancelled March 4/07. 328 p. c. 251			
[3286	Rogers, Albert	24	M	397]*
	Cancelled March 4/07. 328 p. c. 251			
[3287	Low, Lillie	27	F	398]*
	Cancelled March 4/07. 328 p. c. 251			
[3288	Lowe, Ransom	4	M	398]*
	Cancelled March 4/07. 328 p. c. 251			
[3289	Lowe, Evalina	2	F	398]*
	Cancelled March 4/07. 328 p. c. 251			
[3290	Lowe, Bertha	1	F	398]*
*	* * * * *	*	*	

L. R. S.

Department of the Interior, Washington, D. C., Nov. 16, 1904.

Approved:

THOS. RYAN,
Acting Secretary.

(Copy of Roll in Custody of Secretary's Office, Interior Dept.)

[* Words and figures enclosed in brackets erased in copy.]

22 EXHIBIT "D."

Cherokee Freedmen Roll.

No.	Name.	Age.	Sex.	Census card No.
*	* * * * *	*		*
	Cancelled March 4/07. See 22976/07			
[3280	Robbins, Mary	51	F	389]*
	Cancelled March 4/07. See 22976/07			
[3281	Rogers, Dollie	16	F	389]*
	Cancelled March 4/07. See 22976/07			
[3282	Jones, Sherman	1	M	389]*
*	* * * * *	*		*
	Cancelled March 4/07. See 22976/07			
[3286	Rogers, Albert	24	M	397]*
	Cancelled March 4/07. See 22976/07			
[3287	Low, Lillie	27	F	398]*
	Cancelled March 4/07. See 22976/07			
[3288	Lowe, Ransom	4	M	398]*
	Cancelled March 4/07. See 22976/07			
[3289	Lowe, Evalina	2	F	398]*
	Cancelled March 4/07. See 22976/07			
[3290	Lowe, Bertha	1	F	398]*
*	* * * * *	*		*

L. R. S.

Department of the Interior, Washington, D. C., Nov. 16, 1904.

Approved:
THOS. RYAN,
Acting Secretary.

(Copy of roll in custody of Indian Office.)

Demurrer.

Filed April 10, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE et al.,
Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Petitioners say that the answer filed by respondent in the above-entitled cause is bad in substance.

KAPPLER & MERILLAT,
JAMES K. JONES,
Attorneys for Petitioners.

[* Words and figures enclosed in brackets erased in copy.]

23 NOTE.—One matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior of the enrollment of petitioners duly and regularly ordered, the said Secretary being without authority of law to cancel a name duly and regularly placed on the final approved rolls of the Cherokee Nation.

One other matter to be argued on demurrer is that the petitioners by treaty and by law were not required, being former slaves, to have returned to the Cherokee Nation by February 11, 1867, and that failure to return to said Nation by said date affords no reason for cancellation of enrollment, or failure to enroll petitioners on the final approved rolls of the Cherokee Nation.

Order of Dismissal as to Certain Parties.

Filed April 10, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE et al.,
Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Come now the petitioners by their attorneys Kappler & Merillat and James K. Jones and dismiss the above-entitled cause so far as relates to William J. Lowe and James H. Lowe, children of Lillie Lowe.

KAPPLER & MERILLAT,
JAMES K. JONES,
Attorneys for Petitioners.

Order Sustaining Demurrer.

Filed April 24, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE et al.,
Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petitioners' demurrer to the answer of the respondent, it is considered that said demurrer be, and the same is hereby sustained this 24th day of April, A. D. 1908.

WRIGHT, *Justice.*

24 *Order Directing Mandamus to Issue.*

Filed April 24, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50255.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE et al., Relators,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Come now here as well the relators as the respondent by their respective attorneys; whereupon the relators' demurrer to the answer of the respondent having been sustained on this 24th day of April, A. D. 1908, the respondent by his attorneys says he will stand upon his answer.

Thereupon the Court, being fully advised, it has considered, ordered and adjudged, that the respondent James Rudolph Garfield be, and he is hereby commanded within twenty days after this date to restore the names of the relators to the freedmen rolls of members or citizens of the Cherokee Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to relators' rights in said Cherokee Tribe or Nation, and to recognize relators as enrolled freedmen members of said Tribe or Nation.

The respondent thereupon in open court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this court to the Court of Appeals of the District of Columbia, which was allowed, and pending such appeal, the judgment is stayed and no writ shall issue thereon against the respondent.

WRIGHT, *Justice.*

25 *Mandate.*

Filed December 18, 1909.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between The United States of America, ex rel. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, William J. Lowe, James H. Lowe, Albert Rogers and Dollie Jones, heirs at law of Sherman Jones, deceased, petitioners, and James Rudolph Garfield, Secretary of the Interior, respondent, Law No. 50255, wherein the order of the said Supreme

Court entered in said cause on the 24th day of April, A. D. 1908, is in the following words, viz:

"Come now here as well the relators as the respondent by their respective attorneys; whereupon the relators' demurrer to the answer of the respondent having been sustained on this 24th day of April, A. D. 1908, the respondent by his attorneys says he will stand upon his answer.

"Thereupon the Court, being fully advised, it has considered, ordered and adjudged, that the respondent James Rudolph Garfield be, and he is hereby commanded within twenty days after this date to restore the names of the relators to the freedmen rolls of members or citizens of the Cherokee Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to relators' rights in said Cherokee Tribe or Nation, and to recognize relators as enrolled freedmen members of said Tribe or Nation.

"The respondent thereupon in open court by counsel ex-
26 cepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, which was allowed, and pending such appeal, the judgment is stayed and no writ shall issue thereon against the respondent.

WRIGHT, *Justice.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, at the April Term, A. D. 1909, of said Court of Appeals, the retirement of James Rudolph Garfield and the appointment of Richard A. Ballinger as his successor as Secretary of the Interior, having been suggested, it was ordered that the said Richard A. Ballinger as such Secretary, be made the party appellant herein.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said Richard A. Ballinger, Secretary of the Interior, recover against the said petitioners Forty five dollars and sixty five cents for his costs herein expended and have execution therefor.

27 And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

NOVEMBER 30, 1909.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and

justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 18th day of December in the year of our Lord one thousand nine hundred and nine.

Costs of Richard A. Ballinger, Sec'y of the Interior.

Clerk	$9.90	Due Clerk
Attorney	5.00	
Printing Record	30.75	
	$45.65	
Record	15.65	
	$61.30	

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

28 *Order Substituting Defendant.*

Filed June 13, 1910.

On motion of counsel for petitioners, counsel for respondent in open court consenting, it is by the court this 13th day of June, 1910, ordered that Richard A. Ballinger, Secretary of the Interior, be substituted as party defendant in the above-entitled cause in the place and stead of James R. Garfield, formerly Secretary of the Interior.

WRIGHT, *Justice.*

Order.

Filed June 13, 1910.

The Court of Appeals having reversed the judgment of this court entered on demurrer filed by petitioners to the answer of the respondent in the above-entitled cause, with costs, with directions to take further proceedings in conformity to the opinion of the Court of Appeals, as appears by the mandate of said Court of Appeals here presented by counsel for petitioners, the defendant also appearing in open court by counsel, it is by the court ordered that judgment be entered herein against petitioners for costs adjudged in said Court of Appeals. Therefore, it is considered that the respondent recover against said plaintiffs, petitioners, the sum of $61.30/100 for his costs aforesaid, and that execution issue therefor.

And it is further ordered that the order of this court en-
29 tered herein directing that the writ of mandamus issue against the respondent be, and the same hereby is, vacated and for nothing held, and that the demurrer filed herein by petitioners to the answer of respondent to their petition and the rule to show cause

issued by the court thereon be, and the same hereby is, overruled, with leave to petitioners to plead over or to take such further steps as they may be advised. And thereupon, the petitioners by their counsel in open court say that they do not care to plead over but will stand upon their demurrer as originally filed herein, whereupon, it is by the court this 13th day of June, 1910, ordered that the rule to show cause be, and the same hereby is, discharged and the petition filed herein be, and the same shall, stand dismissed, and that final judgment for costs be entered against petitioners. Thereupon the petitioners in open court by their counsel entered an appeal to the Court of Appeals from the order of this Court dismissing this their cause and directing that final judgment for costs be entered against them and prayed the court to fix the bond for costs on appeal, which the court accordingly did, at and in the sum of one hundred dollars bond for costs on appeal, with leave to deposit fifty dollars in currency with the Clerk of the Court in lieu of bond for costs on appeal if so advised.

WRIGHT, *Justice.*

Memorandum.

June 18, 1910.—$50 deposited in lieu of appeal bond.

30 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 29, both inclusive, to be a true and correct transcript of the record, according to rule five of the Court of Appeals of the District of Columbia, in cause No. 50255, at Law, wherein The United States of America, ex rel. Lillie Lowe, et als. are Petitioners and Richard A. Ballinger, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of June, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2187. The United States ex rel. Lillie Lowe et al., appellants, vs. Richard A. Ballinger, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Jul- 5, 1910. Henry W. Hodges, clerk.

Thursday, October 6th, A. D. 1910.

No. 2187.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

The argument in the above entitled cause was commenced by Mr. C. H. Merillat, attorney for the appellant, and was continued by Mr. Oscar Lawler, attorney for the appellee, and was concluded by Mr. C. H. Merillat, attorney for the appellant.

No. 1913.

RICHARD A. BALLINGER, Secretary of the Interior, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, Heirs at Law of Sherman Jones, Deceased.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

This is an appeal by the Secretary of the Interior from an order of the Supreme Court of the District directing the issuance of a writ of mandamus commanding the Secretary "to restore the names of the relators to the freedmen rolls of members or citizens of the Cherokee Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to relators' rights in said Cherokee Tribe or Nation, and to recognize relators as enrolled freedmen members of said tribe or nation." The relators, under a stipulation or agreement with the respondent, brought their action collectively, instead of individually, to save a multiplicity of suits. While the cause was pending Secretary Garfield retired and his successor was made party respondent in his stead.

The relators claim to be Cherokee freedmen by blood and by descent from former recognized slaves of the Cherokees prior to and at the commencement of the civil war, except that Dollie Jones claims to be the heir at law of Sherman Jones, deceased, who, it is claimed, was a descendant of a former Cherokee freedman. They aver that prior to November 16, 1904, the Secretary of the Interior confirmed a decision by the Commission to the Five Civilized Tribes, holding that relators, except William J. Lowe and James H. Lowe, designated in the petition as "new borns," were entitled to enrollment as freedmen citizens of said Cherokee tribe or nation; that after a full and careful inquiry into the rights of relators and the

record in the case, the names of relators, except said William J. and James H. Lowe, were, prior to November 16, 1904, duly and regularly ordered placed on the final roll of freedmen citizens of said Cherokee Tribe or Nation; that thereafter the final roll of freedmen citizens of said nation containing the names of relators, as such citizens, was duly and regularly approved by the lawful incumbent of the office of Secretary of the Interior, and the names of relators were duly entered and placed on the regularly authenticated and approved final rolls of freedmen citizens of said nation; that prior to the time when the names of relators were struck from said final rolls of said freedmen citizens of said nation, the relators, except said William J. and James H. Lowe, duly and regularly selected an allottment of 110 acres, each of average allotable lands of the Cherokee Nation, and after the names of relators had been duly and regularly placed on the final approved rolls of freedmen citizens of the Cherokee Nation allotment certificates were duly and regularly issued to relators for the lands so selected by them by the Commission to the Five Civilized Tribes, and are now held by them as conclusive evidence of their right to the lands so selected by them and described in the allotment certificates aforesaid; that after the issuance to relators of said allotment certificates the Secretary of the Interior arbitrarily and illegally undertook to deprive relators of the rights vested in them by law, and without lawful right or power so to do, struck or attempted to strike their names from said approved final rolls of Cherokee freedmen.

The relators also aver that their ancestors, as a matter of fact, returned to and were within the Cherokee Nation on and prior to February 11, 1867, and further aver that they were not required to have so returned by any treaty or other law, their ancestors having been Cherokee slaves at the outbreak of the civil war; that the cancellation of the names of relators was thus illegally and arbitrarily ordered because of an erroneous construction of the law.

To this petition the Secretary responded, admitting that relators were descended from former Cherokee slaves, but denying that they or any of them were citizens or members of said Cherokee Nation. The answer also admitted "that on Nov. 16th, 1904, the Acting Secretary of the Interior approved a partial list of freedmen members of the Cherokee Nation, which contained the names of Mary Robbins, Sherman Jones, Albert Rogers, Lillie Lowe, Ransom Lowe, Evalina Lowe, and Bertha Lowe, said persons having been adjudged by the Commission to the Five Civilized Tribes, upon applications duly made by them or on their behalf to be entitled to be enrolled as freedmen members of the Cherokee Nation, said commission having found upon the hearing had upon such applications that the principal applicant, Mary Robbins, through whom the others claimed to be entitled to be enrolled, was the slave of a Cherokee citizen at the commencement of the rebellion, but returned to the Cherokee Nation within the time specified in the decree of the Court of Claims rendered on Feb. 3rd, 1896, in the case of Moses Whit-

mire, trustee, etc. v. the Cherokee Nation et al., for the return of freedmen to said nation."

The answer further admitted that thereafter and within the time fixed by the act of Congress of April 26, 1906 (34 St. at L., 137), for the completion of the rolls of the Five Civilized Tribes, his predecessor disapproved the enrollment of said citizens and struck their names from said partial list. It was also admitted that after said approval by the Acting Secretary of the Interior of said partial list containing the above names of relators' allotment certificates were issued to them for lands selected by them as their allotments, but the answer averred that thereafter said allotment certificates were cancelled and other persons allowed to file on certain of said lands, and that no patents were ever issued or recorded for said lands; that after said approval by the Acting Secretary of the Interior of said partial list of freedmen members of the Cherokee Nation and on June 30, 1905, said commission rendered its decision upon the application for the enrollment as Cherokee freedmen of one James Rogers, who was shown by the evidence submitted to be a son of Mary Robbins, or Mary Rogers, whose enrollment had been approved as aforesaid, that the right of said James Rogers to be enrolled depended upon whether his mother, Mary Robbins, or Mary Rogers, had returned to the Cherokee Nation within the time specified by the decree of the Court of Claims rendered February 3, 1906; that said commission found that said Mary Robbins, or Mary Rogers, did not return and establish her residence in said nation within the time specified in said decree, and, therefore, denied the application; that subsequently, on July 19, 1906, the Secretary of the Interior, by the Assistant Secretary, set aside said decision of said commission denying the application of said James Rogers and directed a rehearing therein, and in the same order directed the Commissioner to the Five Civilized Tribes to rehear and readjudicate the application for enrollment of the relators and to consolidate all said applications on said rehearing and readjudication; that thereafter and within the time fixed by law for the completion of the rolls of said Five Civilized Tribes a rehearing of said consolidated applications was had after due notice to all the parties concerned, at which rehearing they appeared either in person or by counsel, or both, and that upon said hearing the Commission to the Five Civilized Tribes rendered a decision dated December 3, 1906, holding that the evidence submitted showed that the principal applicant, Mary Robbins, "was the slave of a Cherokee citizen at the commencement of the war of the rebellion; that during the progress of said rebellion she left the Cherokee Nation and did not return thereto and establish an actual bona fide residence in the Cherokee Nation within the time specified in the decree of the Court of Claims rendered February 3, 1896, in the case of Moses Whitmire, trustee, etc., v. The Cherokee Nation et al., as provided by paragraph 2, of section 3, of the act of Congress approved April 26, 1906 (34 St. at L., 137), for the return of freedmen to said nation. Said commissioner further found that the evidence showed that all the other applicants were descendants of said Mary Robbins, born since 1866, and neither

claimed nor possessed any rights to enrollment as Cherokee freedmen other than as such descendants, and that, excepting the Kern-Clifton roll, none of the applicants could be identified on any roll of the Cherokee Nation in the possession of his office;" that said commissioner adjudged said applicants not entitled to enrollment as Cherokee freedmen, and severally denied their applications; that thereafter on March 4, 1907, the Acting Secretary of the Interior confirmed said decision and thereby cancelled the names of said persons from said partial lists approved as aforesaid; that in reopening and readjudicating said cases the Secretary proceeded in accordance with a long established and well recognized practice of the department extending from July, 1902, until the close of March 4, 1907. The answer further states that William J. Lowe and James H. Lowe, who claim to be entitled to enrollment as "new borns" under the act of Congress of April 26, 1906 (34 St. at L., 137), were never enrolled, but that their applications were severally denied.

To this answer a demurrer was filed, which was sustained by the court, and, the respondent electing to stand upon his demurrer, the writ of mandamus was ordered to issue.

Counsel for the petitioners in the hearing at bar abandoned their contention as to the so-called "new borns;" hence they may be dismissed from further consideration.

The several assignments of error are all embraced in the general proposition whether the authority of the Secretary was exhausted as to any enrollment when once exercised. If it was not exhausted, and he had a right to rehear and readjudicate the applications of these relators his decision will not be disturbed unless it appears that he has misinterpreted the plain and unambiguous provisions of the statute. On the other hand, if, in the absence of a showing of fraud, he was without authority to deprive petitioners of rights which had enured by reason of his prior adjudications, it follows that they are entitled to the remedy sought. Garfield v. Goldsby, 211 U. S., 249.

The right of relators to enrollment as citizens of the Cherokee Nation was dependent on the interpretation by the Secretary of article 9 of the Cherokee treaty of August 11, 1866 (14 St. at L. 699), the material part of which is as follows: "They (Cherokee Nation) further agree that all freedmen who have been liberated by voluntary act of their former owners or by the law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now resident therein or who may return within six months and their descendants, shall have all the rights of native Cherokees."

The relators were enrolled upon the understanding that their ancestor, Mary Rogers, returned to the Cherokee Nation within six months from August 11, 1866. The rehearing resulted in the finding that she did not return within that time, and, therefore, that relators were not entitled to enrollment.

Subsequent to the enrollment of relators and prior to the cancellation of such enrollment by the Secretary, the act of April 26, 1906, entitled "an act for the final disposition of the affairs of the Five Civilized Tribes of the Indian Territory, and for other pur-

poses," was passed. In that act it is provided that: "The roll of Cherokee freedmen shall include only such other persons of African descent, either free colored or slaves of Cherokee citizens and their dscendants, who were actual bona fide residents of the Cherokee Nation August 11th, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11th, 1867; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes, or its successor, and has been adjudged entitled to enrollment by the Secretary of the Interior" (34 St. at L., 137, par. 2, sec. 3).

If any doubt theretofore existed as to the proper construction to be given article 9 of said treaty of August 11, 1866, that doubt was dissipated by the language of section 3 of the above act of April 26, 1906, for that language constitutes a legislative interpretation of, and supersedes pro tanto, the prior treaty. The Cherokee Tobacco, 11 Wallace, 616. In other words, we think that under the true construction of the language of said treaty of August 11, 1866, the benefits of citizenship were conferred only upon free colored persons or the slaves of Cherokee citizens and their descendants, who were actual bona fide residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation within six months from that time.

It is contended by appellees that this case is governed by the decision in Garfield v. Goldsby, 211 U. S., 249, but there is a fundamental difference between the two cases. Goldsby had been found by the Dawes Commission to be entitled to enrollment, and the Secretary of the Interior had approved the final roll upon which Goldsby's name appeared. Thereupon the Secretary, without notice to Goldsby, struck his name from the roll. The Supreme Court confirmed the decision of this court that the Secretary had no power or authority "without notice or hearing to strike down the rights thus acquired." Nowhere in the opinion of the Supreme Court is it intimated that the Secretary is without authority, after notice or hearing, to correct a manifest error in making up such a roll.

Section 29 of the act of July 21, 1892 (32 St. at L., 716), provides: "For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Commissioner of Indian Affairs, one with the principal

chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes."

It will be observed that this section "for the purpose of expediting the enrollment of Cherokee citizens and the allotment of lands" therein provides that partial lists shall be forwarded to the Secretary and that when these partial lists shall have been by him approved they shall constitute a part of the final roll of citizens of the Cherokee tribe. This provision enabled the commission to forward the result of its investigations, as the work progressed, to the Secretary for his review and approval. In other words, the provision enabled the commission to forward its findings in instalments. It is, we think, quite clear that Congress did not contemplate that the roll should be deemed complete and beyond the control of the Secretary until lists embracing the names of all those lawfully entitled to enrollment had been submitted to and passed upon by him. Until the roll was complete we think it was the intention of Congress that he should have jurisdiction and control over every part of it. It is unreasonable to suppose that Congress in merely providing that the commission might, from time to time, forward to the Secretary lists containing the names of those thought to be entitled to enrollment intended to deprive the Secretary, after he had once acted upon a given application, of further authority over it. Rather do we think that the Secretary's authority continued until the entire roll was complete. The construction urged by appellees is so literal and narrow that in our view it does violence to the import and general purpose of the act. Having in mind that the duties of the Secretary in the premises were quasi judicial and considering the object of the provision for the submitting in instalments to the Secretary of the work of the commission, we rule that the Secretary had the same power over the roll, until terminated by statutory limitations, that a court has over its judgments.

After its first adjudication the commission discovered new evidence indicating that relators were not entitled to enrollment. Upon this evidence being brought to the attention of the Secretary, a rehearing was directed. Due notice was given and a rehearing, in which the relators participated, was had. This rehearing resulted in the setting aside of the prior adjudication, and the striking of the relators' names from the rolls. There is no contention that every requirement of due process of law was not observed. We therefore rule that the Secretary's authority as to these enrollments was not exhausted when he acted upon the record first submitted to him, and that he had power to correct the error discovered.

It is next contended that even conceding that prior to said act of April 26, 1906, the Secretary possessed authority or jurisdiction over partial enrollments theretofore made by him, that act deprived him of such authority. The particular language relied upon is found in said section 3 and is as follows: "but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes, or its successor, and has been adjudged entitled to enrollment by the Secretary of the Interior."

The question is therefore presented whether the words "and has been adjudged entitled to enrollment by the Secretary of the Interior" refer to the original, and as we have held preliminary, adjudication of the Secretary, or whether they were merely intended to set at rest the claims of those whose names should appear upon the final roll. We incline to the latter view. Surely Congress did not intend to bestow the right of enrollment upon those who had been fortunate enough to have their applications preliminarily passed upon by the Secretary prior to the passage of this act and deprive others of the same class of that right simply because the commission had not then forwarded the names of such applicants to the Secretary. It is more reasonable to suppose that Congress intended to do no more than to prevent inquiry, based upon the status of the ancestor of the claimant, subsequent to the approval of the final roll. Any other view would result in injustice.

The decree must be reversed with costs and the cause remanded for further proceedings not inconsistent with this opinion.

No. 2187.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Opinion.

Mr. Justice VAN ORDSDEL delivered the opinion of the Court:

We had this case under consideration on a former appeal. 34 D. C. App., 70. The judgment here appealed from was rendered in compliance with the mandate of this court. The legal status of the parties remains unchanged. It is insisted, however, by counsel for appellants that our former opinion is erroneous because inconsistent with an opinion since rendered in the case of Ballinger v. Frost, 216 U. S., 246. It will be observed by reference to these opinions that the facts in the two cases are substantially different. The principles of law involved in the one case have little or no application to the other.

In the case of Ballinger v. Frost, supra, the allotment certificate, which the law declared to be "conclusive evidence of the right of any allottee to a tract of land described therein," had been issued to the relator Frost. After the time within which contest could be instituted had elapsed and the rights under the allotment had vested, patent was withheld by the Secretary of the Interior because the land selected was being used as a town site. The validity of the allotment was not assailed, and it was conceded that the relator was legally entitled to be enrolled and to secure her land. But, by reason of the town having been built upon land open to entry at the

time the relator made her selection, the Secretary undertook to set it apart as a town site, and allow relator to select other land. It was in pursuance of this purpose that he refused to issue and deliver her a patent. It was held by the court that the issuance of the patent was a mere ministerial duty, in the performance of which the Secretary had no discretion.

Speaking generally of the power of the Secretary, Mr. Justice Field, in Cornelius v. Kessel, 128 U. S., 456, said: "The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." This furnishes the distinction between the cases here under consideration. In the Frost case the relator was entitled to receive her allotment. This gave her a lawful right to select the land, and, having done so, the Secretary was powerless to divest her of that right. In the present case, the relators wrongfully secured their enrollment and allotments; they were obtained "without authority of law;" and, before the time for the final approval of the rolls by the Secretary had expired, the error was discovered and corrected.

It is sought to have a writ issued requiring the Secretary to erase from the rolls his entry striking relators' names therefrom. The Assistant Attorney-General urges that, if the relief prayed for is granted, it would not change or improve the legal status of the relators. Their rights, if any they had, being fixed by law, could not, he insists, be destroyed by the act of the Secretary in erasing their names from the rolls. The contention is not without merit, but we do not deem it necessary to reopen the case. We are unable to discover anything in our former opinion inconsistent with the views expressed in Ballinger v. Frost. The mere placing of relators' names on the partial rolls did not, in our opinion, establish such an indefeasible status as prohibited the Secretary from making further inquiry into the question of their proper enrollment, and, if discovered to be improper before the rolls finally passed beyond his jurisdiction, from correcting the error.

For the reasons stated, the judgment is affirmed, with costs, and it is so ordered.

Affirmed.

Tuesday, November 1st, A. D. 1910.

No. 2187, October Term, 1910.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL,
November 1, 1910.

Wednesday, November 9th, A. D. 1910.

No. 2187.

THE UNITED STATES OF AMERICA ex Rel. LILLIE LOWE, RANSOM Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, Heirs at Law of Sherman Jones, Deceased, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

On motion of Mr. C. H. Merillat, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars, with leave to deposit cash in lieu of bond.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America ex rel. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, heirs-at-law of Sherman Jones, deceased, Appellants, and Richard A. Ballinger, Secretary of the Interior, Appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We

being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 9th day of November, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Lillie Lowe, as principal, and The United States Fidelity & Guaranty Co., a Corporation of the State of Maryland, as surety, are held and firmly bound unto Richard A. Ballinger, Secretary of the Interior, in the full and just sum of Three Hundred Dollars to be paid to the said Richard A. Ballinger, Secretary of the Interior, his certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-first day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between The United States of America ex rel. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, heirs at law of Sherman Jones, deceased, versus Richard A. Ballinger, Secretary of the Interior, a judgment was rendered against the said Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers and Dollie Jones, heirs at law of Sherman Jones, deceased and the said Lillie Lowe et al. having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard A. Ballinger, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Lillie Lowe et al. shall prosecute said writ of error to effect, and answer all costs if they or any of them fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LILLIE LOWE. [SEAL.]
THE UNITED STATES FIDELITY
& GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of—

——— ———.

[Seal of The United States Fidelity & Guaranty Co.]

Approved by—

CHAS. H. ROBB,
Associate Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2187. The United States of America ex Rel. Lillie Lowe et al., Appellants, vs. Richard A. Ballinger, Secretary of the Interior. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 21, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Richard A. Ballinger, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex Rel. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, heirs at law of Sherman Jones, deceased are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 21st day of November, in the year of our Lord one thousand nine hundred and ten.

CHARLES H. ROBB,
Associate Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 21st day of November, A. D. 1910.

OSCAR LAWLER,
Asst. Att'y Gen'l, Interior Dep't.
J. W. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 21, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 38 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America ex rel. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, heirs-at-law of Sherman Jones, deceased, appellants, vs. Richard A. Ballinger, Secretary of the Interior, No. 2187, October Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of November, A. D. 1910.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,415. District of Columbia Court of Appeals. Term No. 794. The United States of America ex rel. Lillie Lowe et al., plaintiffs in error, vs. Richard A. Ballinger, Secretary of the Interior. Filed November 23d, 1910. File No. 22,415.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 445.

THE UNITED STATES OF AMERICA *Ex Relatione* LILLIE LOWE, RANSOM LOWE, BERTHA LOWE, EVALINA LOWE, MARY ROBBINS, ALBERT ROGERS, and DOLLIE JONES, heirs at law of SHERMAN JONES, deceased,
Plaintiffs in Error,

vs.

WALTER L. FISHER, Secretary of the Interior.

In Error to the Court of Appeals of the District of Columbia.

MOTION TO ADVANCE TO BE HEARD WITH NO. 60 AS ONE CASE.

Come now the plaintiffs in error in the above-entitled cause and move the Court to advance said cause for hearing and to order that said cause shall be heard with and in the time of Cause No. 60 on the present docket of this term of court, entitled "The United States of America *Ex Relatione*

Lucy Ann Turner et al., Plaintiffs in Error, vs. Walter L. Fisher, Secretary of the Interior," and for reasons therefor state:

1. That the counsel for the respective parties in Causes No. 445 and 60 are the same.

2. That said causes for their determination depend upon consideration of the same statutes, namely, statutes of the United States relating to enrollments and allotments in the Five Civilized Tribes of Indians, and that said statutes are complicated and the time of the Court would be saved by consideration of the two causes as one.

3. That while said causes are not identical and depend to an extent upon different considerations, yet nevertheless their determination to quite an extent depend upon the same statutes, and they can readily be heard as one cause.

4. That Cause No. 445 involves the question of the right of the Secretary of the Interior under any conditions to strike from the rolls of the Five Civilized Tribes the names of persons enrolled and who have received allotments of land, and upon the determination of this cause depends the rights of several hundred other allottees of the Five Civilized Tribes and determination of the cause would tend in the direction of a settlement of the affairs of the Five Civilized Tribes which the Congress and Executive Departments of the Government of the United States are anxious to bring about.

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
JAMES K. JONES,
Attorneys for Plaintiffs in Error.

We consent.

WILLIAM R. HARR,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

NO. 445.

THE UNITED STATES OF AMERICA EX REL. LILLIE LOWE, RANSOM LOWE, BERTHA LOWE, EVALINA LOWE, MARY ROBBINS, ALBERT ROGERS AND DOLLIE JONES, HEIR AT LAW OF SHERMAN JONES, DECEASED, PLAINTIFFS IN ERROR.

VS.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
JAMES K. JONES,
FRANK. E. DUNCAN,
Attorneys for Plaintiffs in Error.

J. D. MILANS & SONS, LAW PRINTERS, 615 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

NO. 445.

THE UNITED STATES OF AMERICA EX REL. LILLIE LOWE, RANSOM LOWE, BERTHA LOWE, EVALINA LOWE, MARY ROBBINS, ALBERT ROGERS AND DOLLIE JONES, HEIR AT LAW OF SHERMAN JONES, DECEASED, PLAINTIFFS IN ERROR.

VS.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

This case comes to the Supreme Court on writ of error sued out by the plaintiffs in error, Lillie Lowe et al., from an order and judgment of the Court of Appeals of the District of Columbia (Rec. p. 36), affirming a judgment of the Supreme Court of the District of Columbia overruling a demurrer filed by plaintiffs in error to an answer filed by the Secretary of the Interior to a mandamus petition filed by the plaintiffs in error and dismissing the

mandamus petition with costs (Rec. p. 26). The plaintiffs in error February 18, 1908, filed a petition in the Supreme Court of the District of Columbia seeking by mandamus to compel James R. Garfield, Secretary of the Interior, to erase certain marks on the approved rolls of freedmen members of the Cherokee tribe of Indians in derogation of the claim of the petitioners, plaintiffs in error herein to be duly enrolled members of said Cherokee tribe, to restore them to and to recognize them as lawfully enrolled members of said tribe (Rec. 11) with all the rights appertaining to lawfully enrolled members, including the right to certain allotments of land selected by each of petitioners as their share of the Cherokee tribal estate and for which allotment certificates had been issued to them before the cancellation or attempted cancellation of their names from the tribal rolls by Secretary Hitchcock and which lands the Secretary was attempting to allot to others. Mr. Garfield as Secretary of the Interior responded and filed answer to the petition and a demurrer to the answer was filed by the plaintiffs in error and sustained by the trial court, the Supreme Court of the District of Columbia (Rec. 23), and an appeal was taken by the respondent from an order directing the writ of mandamus should issue in the cause (p. 24). On appeal this order was reversed by the Court of Appeals of the District of Columbia in a written opinion (p. 28) and on remand the demurrer was overruled and petitioners, plaintiffs in error here, electing to stand on their demurrer final judgment was entered (p. 27) by the Supreme Court of the District of Columbia. From affirmance on appeal of this final judgment (p. 36), in another written opinion by the Court of Appeals (p. 34), the cause was removed to this court on writ of error (p. 36).

Statement of the Case.

The case at bar comes before the court on the pleadings, consisting of a petition and rule to show cause, an answer to the petition and rule and a demurrer to the answer, with the orders of the lower courts thereon ending in dismissal of the petition. The essential facts are conceded by the pleadings so that the cause resolves itself into first, whether or not under the statutes with reference to enrolments and allotments in the Five Civilized Tribes the Secretary of the Interior after duly and regularly approving rolls containing the names of the plaintiffs in error and allotting lands to them, for which they were issued allotment certificates, lawfully could strike their names from the rolls, refuse to issue them patents for the lands allotted and proceed to allot the lands to others, they having notice and a hearing before the Secretary's attempted cancellation, the case differing from the Goldsby and Allison cases in that the names were stricken from the rolls only after notice and hearing; second, whether if the Secretary had such authority of cancellation it was or was not plain manifest error of law for him to cancel their names because they, as he found, had not returned to the Cherokee Nation prior to February 11, 1867, they being found by him to be descendants of former Cherokee slaves and, as they claimed, not required under the Cherokee treaty of August 11, 1867, to return within six months, that time limitation applying only to "free colored persons," third, if the Secretary's construction of the Cherokee treaty aforesaid was not plain, manifest error of law whether or not as to plaintiffs in error he was not prohibited from cancelling their enrolment by the provisions of the act approved April 26, 1906, to

wind up the affairs of the Five Civilized Tribes, they having been duly enrolled in November, 1904, and being on the Kern-Clifton roll made pursuant to decree of the Court of Claims.

The petition alleged the plaintiffs in error were freedmen members of the Cherokee Tribe of Indians and enrolled tribal members and the answer denied the same, but on this point the pleadings have been held by this court in the Goldsby case to raise issues of law under the other recitations in the pleadings.

The petition alleged that plaintiffs in error were former slaves or descendants of former slaves of the Cherokee Nation (p. 3), that they applied to be and prior to November 16, 1904 (p. 7) were found by the Commission to the Five Civilized Tribes and the Secretary of the Interior to be entitled to enrolment as freedmen members of the Cherokee tribe of Indians and that on November 16, 1904, a final roll of Cherokee freedmen containing their names was duly approved by the Secretary of the Interior. It alleged that each of the plaintiffs in error duly selected an allotment of 110 acres of allotable land in the Cherokee Nation and prior to the attempted cancelation of their enrolment were duly issued allotment certificates as conclusive evidence of their right to the lands, selected. That thereafter the Secretary arbitrarily and illegally undertook (p. 9) to deprive them of their right to the lands allotted and to their undivided share in the tribal funds of the Cherokee tribe and in any surplus lands remaining after all Cherokee enrolled members were allotted by striking their names from the approved rolls and noting on the rolls containing their names that their enrolment had been canceled March 4, 1907. That the Secretary when he ordered cancellation

of their enrolment found that they were each and all descendants of former Cherokee slaves resident in the Cherokee Nation at the outbreak of the civil war, liberated by voluntary act of their former owners or by law during the war of the rebellion, but by an erroneous construction of the Cherokee treaty of 1866 concluded their enrolment should be canceled because they had not returned to the Cherokee Nation within six months of the date of the treaty, August 11, 1866. The petition alleged their ancestors had returned prior to February 11, 1867, as matter of fact, but asserted that as matter of law, the six months period applied only to "free colored persons" resident in the Cherokee Nation at the commencement of the civil war and not to former Cherokee slaves. It alleged the Secretary was attempting to allot others on the lands belonging to plaintiffs in error and to permit others to drill for oil thereon and was refusing to recognize petitioners as entitled to share in the Cherokee lands and funds. Mandamus was asked to compel full recognition of the rights of plaintiffs in error as lawfully enrolled freedmen members of the Cherokee tribe.

The answer (p. 14) admitted the descent of the petitioners, plaintiffs in error here, from a former Cherokee slave named Mary Rogers or Mary Robbins and that on November 16, 1904, the Secretary had approved a partial list of Cherokee freedmen containing their names for the reason that it was found Mary Robbins was the slave of a Cherokee citizen at the outbreak of the war and was taken to Kansas during the rebellion but returned within the time specified in the Court of Claims decree of February 3, 1896, in the Whitmire case. It alleged (p. 16) the names of none of the parties to the suit were on any rolls of the Cherokee

Nation except the Kern-Clifton roll (this is the roll prepared under the Court of Claims decree in the Whitmire case.) The answer further stated that on June 30, 1905, a decision was rendered on the enrolment application of one James Rogers, a son of Mary Rogers or Robbins, and that it was found in that case that Mary Rogers or Robbins did not return to the Cherokee Nation by February 11, 1867, whereupon a readjudication was directed of the case of the present plaintiffs in error, the result being after due notice and hearing (p. 16) of all parties concerned that the Commission to the Five Civilized Tribes on December 3, 1906, found that the ancestor on whose rights rested the claim of her descendants had not returned to the Cherokee Nation by February 11, 1867, and adjudged (p. 19) they should be denied enrolment, which judgment being affirmed by the Secretary their enrolment had been canceled by orders issued March 4, 1907 (p. 17), actual cancellation taking place after that date. The answer averred the readjudication and cancellation was in accordance with his "long-established and well-recognized practice" from the act of Congress of July 1, 1902, until March 4, 1907, several hundred names having been struck from the rolls during that time because found to have been unlawfully or improperly enrolled.

Demurrer was filed to the answer (p. 22) on the ground it was bad in substance and, following the rules of the Supreme Court of the District of Columbia, which, however, require only one ground of demurrer to be stated and permit all points that may be raised to be argued, by note to the demurrer the demurrants questioned, first, the lawful authority of the Secretary to cancel a name duly and regularly placed on the final approved rolls of the Cherokee Nation, and second the correctness of the

ruling that former slaves were required to return to the Cherokee Nation by February 11, 1867.

The trial court sustained the demurrer (p. 23) and directed mandamus to issue (p. 24) from which judgment an appeal was taken to the Court of Appeals, which reversed the lower court (p. 28) on the ground that the case was not controlled by the opinion of this court in the Goldsby and Allison cases, the Court of Appeals holding that by those cases this court had decided only the power or authority of the Secretary to strike down rights acquired "without notice or hearing" and that this court had not intimated "that the Secretary is without authority after notice or hearing to correct a manifest error in making up such a roll." The court said that in its opinion the Secretary's authority and control over the rolls continued until the entire roll was complete and that the approval of partial lists by the Secretary was simply tentative to enable the forwarding of results of the Dawes Commission's investigations as the work progressed. It held, therefore, that the Secretary's authority as to enrollments was not exhausted and that he had the right of adjudication of cases once passed upon.

The court also held that the act of April 26, 1906, was not intended to limit the Secretary's right to redetermine the cases of former Cherokee slaves whose applications had been passed upon by the Secretary prior to the passage of this act (p. 33) and that the act was in effect a legislative declaration as to the true construction of the Cherokee Treaty of 1866.

In order that a final decree might be entered from which, under the decisions of this court, an appeal would lie, counsel for plaintiffs in error did not appeal direct but had the case remanded to the trial court, where they

stood upon their demurrer, and from a judgment dismissing their petition with costs appealed to the Court of Appeals.

While these proceedings were in progress this court rendered its decision in the case of Belle Frost, involving, as counsel conceive, the question whether or not an allotment certificate conferred vested rights upon allottees, of which the Secretary of the Interior as an executive officer could not deprive them, any remedy being in a court of equity, if at all. On the second appeal to the Court of Appeals, that court was asked to reverse itself on the ground that in the Belle Frost case this court, while affirming the action of the Court of Appeals in that case, had not placed it upon the narrow ground upon which the Court of Appeals from its decision in the instant case apparently had placed the Belle Frost decision and urged the court to reverse its opinion in the Lillie Lowe case on the ground that this court had held broadly that the issuance of an allotment certificate conferred vested rights and that this was inconsistent with a power of revision of the rolls by the Secretary after allotment certificates had issued. The court, however, refused to reverse its former opinion and held in an opinion (p. 34) that the facts of the two cases were different and that in the Belle Frost case it was conceded the relator had a right to select some forty acres and that the court had simply held that having a right to select some forty acres, and having selected a particular forty acres, that the Secretary could not take away that right, whereas in the case of the present plaintiffs in error they were not entitled to select any land whatsoever, and that having wrongfully secured enrollment and allottments, they were obtained "without authority of law" and hence were

subject to cancellation and the rolls subject to cancellation when the error was discovered and corrected before the expiration of the time within which the Secretary was required to complete enrolments. The court, therefore, sustained the judgment below, from which action a writ of error was sued out to this court (p. 36).

Statement of Laws Applicable.

The Cherokee agreement of 1902 is the principal if not the determining statute.

The final enrolment of members of the Five Civilized Tribes and division in severalty of the vast tribal estates, aggregating nearly twenty million acres, held in common was initiated by act of Congress approved March 3, 1893 (27 Stats., 645; Kappler, Vol. I, 498). This act created the Dawes Commission and directed it to negotiate with the Five Civilized Tribes with a view to—

> "the ultimate creation of a State or States of the Union, which shall embrace the lands within said Indian Territory."

The act recognized the Indians' title to the lands, but directed the Commission to secure extinguishment of "the national or tribal title" by allotment and equal division in severalty of the land among the tribal members, or the United States, if necessary, would buy the lands and distribute the proceeds. For years prior thereto the Five Civilized Tribes had occupied most of the large area known as the Indian Territory under an early national policy that sought to relieve the pressure of white settlers

for lands and of the Indians from white civilization by concentrating large bodies of Indians in one region.

The parties to be enrolled included three classes: Indians, freedmen and adopted citizens. The plaintiffs in error are concededly descendants of former Cherokee slaves.

The Cherokee Nation in 1893 held title to its lands by virtue of treaties with the United States, whereby they had ceded lands east of the Mississippi River to the United States in exchange for their lands in Oklahoma. (Rec., p. 2.) Article 1 of the Cherokee Treaty, proclaimed August 7, 1846, vested a free simple title in the Indians in the western lands, subject to the condition—

> "that such lands shall revert to the United States if the Indians become extinct or abandon the same."

The effect of the laws as to division in severalty of the lands of the Five Civilized Tribes was to release this bare possibility of reversion of the United States.

Subsequent to the Civil War, the United States held that by disloyalty to the Union cause the Cherokee Nation had forfeited the benefits of its former treaties and imposed on the Cherokee Nation the Treaty of August 11, 1866. It is the provisions of this treaty which conferred, as plaintiffs in error claim, their right in and to equal participation with Cherokee Indians in the tribal lands and funds.

By Article 4 of this treaty, it was provided:

> "All the Cherokees and freed persons who were formerly slaves to any Cherokees, and all free negroes not having been such slaves who resided in the Cherokee Nation prior to June 1st, 1861,"

might have a right of election as to occupation of certain lands.

By Article 9 the Cherokee Nation agreed—

> "that all freedmen who have been liberated, by voluntary act of their former owners or by law as well as all free colored persons who were in the country at the commencement of the Rebellion, and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees" (p. 3). (Correct punctuation as shown by original treaty at the State Department.)

The Cherokees, who had their own distinct government, with limitations, of course, upon their sovereign rights, amended their constitution November 26, 1866, to conform to the treaty, Article 3, Section 5 of the Cherokee Constitution (compiled laws of the Cherokee Nation) being made to read as follows:

> "All native-born Cherokees, all Indians and whites legally members of the Cherokee Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

Article 1, Section 2 of the Cherokee Constitution made the lands of the Cherokee Nation common property, but

required residence within the nation, the section providing that—

> "whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government, all rights and privileges as a citizen of this nation shall cease."

In the instant case it is conceded that all of plaintiffs in error have lived in the Cherokee Nation since their return, but it being a matter of dispute whether they returned in the late autumn of 1866 or in the spring of 1867.

Article 26, Section 720, of the Cherokee compiled laws declared to be an intruder every person except government officials who resided within the Cherokee Nation and yet was not a citizen of the nation, the law making it the duty of sheriffs and United States officers to remove intruders and to sell any property they had within the nation.

In 1886 the Cherokee Nation having funds about to be distributed, passed what was known as the "blood bill," whereby they sought to exclude all but native Cherokees by blood from participation, claiming the freedmen and others had civil or political rights, but not property rights.

This resulted in the case of Whitmire, Trustee, vs. Cherokee Nation, 30 Court of Claims, p. 190 et seq., in which case it was held that Cherokee freedmen had equal property rights under the treaty with blood Cherokees, and by the decree it was provided:

> "The said freedmen who had been liberated by voluntary act of their former owners or by law

> and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last mentioned dates, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood."

Direction was given to make up a roll of such Cherokee freedmen, and pursuant to it there was made up prior to the first legislation for enrolment by the United States of citizens of the Five Civilized Tribes what is known as the Kern-Clifton Roll. The names of plaintiffs in error or their ancestors appeared on this roll, it is conceded in the answer (p. 16).

By Act approved June 10, 1896 (p. 4), Congress, pursuant to a report made by the Dawes Commission November 18, 1895, that great injustice would be done if citizenship were left to absolute determination by the tribal authorities, enacted the first legislation with reference to enrolments in the Cherokee and the other Five Civilized Tribes.

The act authorized the Dawes Commission to hear and determine the applications for citizenship of all persons who might apply to it within three months from its passage, the Commission to "decide all such applications within ninety days after the same shall be made." Due force and effect was to be given to tribal rolls, usages, customs, and laws if not inconsistent with Federal laws, and it provided "that the rolls of citizenship of the several tribes as now existing are hereby confirmed,"

and persons claiming to be entitled to be added to such rolls "and whose right thereto has either been denied or not acted upon," were given the right to have their claims determined within four months by tribal citizenship courts or committees. If any tribe or person was aggrieved with the decision of either tribal authorities or the Dawes Commission an appeal might be taken to the United States District Court, whose judgment was final. After six months the Commission was to make a complete roll of citizenship of each nation from the several sources named, the lists as finally approved by them to be filed with the Commissioner of Indian Affairs "for use as the final judgment of the duly constituted authorities."

The Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the right of persons to be on the tribal rolls, and the controversy which ensued continued, and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time.

By act of June 7, 1897 (30 Stats., 62—Kappler, Vol. I, 88), legislation limiting the confirmation of tribal rolls contained in the act of 1896 was passed. It was enacted that the rolls confirmed meant—

> "the last authenticated rolls of each tribe which have been approved by the Council of the Nation and the descendants of those appearing on such rolls, with such additional names as have been added either by the Council of the Nation, its courts, or t[illegible] Dawes Commission under the act of June 10, 18[illegible]"

The Dawes Commission was given the right to investigate all other names, and after ten days' notice and op-

portunity to be heard, to strike names from the tribal rolls, with right of appeal to the United States courts.

Later, by act of June 28, 1898, known as the "Curtis Act" (30 Stats., 495—Kappler, Vol. I, 90), Congress took up the entire subject of affairs in the Indian Territory and passed a broad comprehensive measure. It reduced the confirmed rolls to the Cherokee roll of 1880, exclusive of freedmen (and later the Dunn Creek roll). The Commission, by Section 21, was "directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto. * * * The rolls so made, when approved by the Secretary of the Interior, shall be final," and the persons whose names are found thereon, with their descendants and persons intermarrying, according to tribal laws, "shall alone constitute the several tribes which they represent." Under it the enrolments of a whole tribe, Section 11, were to be completed before the roll was to be approved and then the entire allotable lands were to be allotted among those on this roll before any allotments should be approved. The lands were specifically declared inalienable and non-taxable by Section 11 until full title was obtained.

By act of May 31, 1900 (31 Stats., 170—Kappler, Vol. I, 105), the Dawes Commission, it was declared, "shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrolment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such ap-

plications shall be final when approved by the Secretary of the Interior."

The act of March 3, 1901 (31 Stats., 1058—Kappler, Vol. I, 112), provided that "The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent." The Secretary of the Interior was directed by agreement with the tribes to fix a time for closing the rolls, and on default of agreement was to fix such time himself, "after which no name shall be added thereto."

In 1902 agreements were effected and approved between the Choctaw and Chickasaw and the Cherokee tribes and the United States. Aside from an earlier Creek agreement, these agreements constitute the first statutes specifically providing for the breaking up on definite terms of the communal land tenure system and allotment in severalty of the tribal lands among the national or tribal members. Assent of the tribes was procured to these agreements, which Congress approved and the President proclaimed.

The Cherokee Agreement, approved July 1, 1902 (32 Stats., 641; 1 Kappler, 787) (an early agreement of 1900-1901 not being ratified), provided:

> "Sec. 6. The word 'select' and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Dawes Commission for the Cherokee Nation, for particular tracts of land.
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> "Sec. 7. The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to mean

members or citizens of the Cherokee Nation, in the Indian Territory.

* * * * *

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe *as soon as practicable after the approval by the Secretary of the Interior of his enrolment as herein provided* (italics ours), land equal in value to one hundred and ten acres, etc.

* * * * *

"Sec. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name and shall, with his proportionate share of other property, descend to his heirs, etc.

"Sec. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior upon the application of the allottee, place him in possession of his allotment and shall remove therefrom all persons objectionable to him, and the acts of the Indian Agent hereunder shall not be controlled by the writ or process of any court.

* * * * *

"Sec. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrolment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

"Sec. 29. For the purpose of expediting the enrolment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrolment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrolment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

* * * * *

"Sec. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: PROVIDED, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date,"

concealment of the date of death being made a felony.

Sections 38 to 57 provided for the laying out of town sites by federal or municipal authority.

> "Sec. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate."

Subsequent sections made acceptance of the conveyance serve as a relinquishment of any interest of the United States in the lands patented and of the right of any allottee in other lands except (Sec. 60) "in the proceeds of lands reserved from allotment."

> "Sec. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.
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> "Sec. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and

> for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. * * *"

Under this section thousands of oil and gas leases have been made by allottees before patent, with the approval of the Secretary, and the mid-continent oil fields developed, so that Oklahoma has become a rival to California as the leading oil producing State.

> "Sec. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision, inconsistent with this agreement, shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made."

Section 13 of the aforesaid Curtis Act of June 28, 1898, was a section authorizing the Secretary of the Interior to make mineral leases of tribal lands.

Sections 14 and 27, which were continued in force, related to incorporations of towns, schools, liquor, and creation of town sites by a town site tribal commission.

By the Indian Appropriation Act of March 3, 1903 (32 Stats., 982), Cherokee and other allottees in the Five Civilized Tribes were permitted to create private town sites in addition to the government established town sites, *"And provided further*, That nothing herein contained shall prevent the survey and platting, at their own

expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Hundreds of town sites have been so established by allottees and in numerous instances prior to patent.

By the Indian Appropriation Act of April 21, 1904 (33 Stat. L., 189), it was provided:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

It also was provided by this Act—

> "that no proceedings heretofore had with reference to allotments in the Cherokee Nation shall be held invalid on the ground that they were had before there was authority to begin the work of allotment in said nation."

Provision was made for the completion of the town-site appraisement and surveys and an appropriation of thirty thousand dollars was made—

> "for the purpose of placing allottees in the Indian Territory in possession of their allotments, to be expended under the direction of the Secretary of the Interior."

By the Indian Appropriation Act, approved June 21, 1906, the government town-site commissions were abolished and allottees were permitted to establish town sites

and have their restrictions removed for this purpose. And "for the purpose of removing intruders and placing allottees in unrestricted possession of their allotments, to be expended under the direction of the Secretary of the Interior," twenty thousand dollars was appropriated, and two hundred thousand dollars was appropriated for the completion of the work of the Five Civilized Tribes and the duty of completing the Commission's unfinished business was devolved on the Secretary of the Interior.

By the Act approved April 26, 1906, "providing for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes" it was provided by Section 1 as follows:

> "That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrolment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: PROVIDED, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nine-

> teen hundred and five, and which was not allowed solely because not made within the time prescribed by law."

By Section 2, ninety days were given within which applications might be received for the enrolment of minor children, and it was further provided:

> "And after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw—Chickasaw, Cherokee, Creek or Seminole tribes, and after the expiration of six months from the passage of this Act, as to allotments heretofore made, no contest shall be instituted against such allotment: PROVIDED, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrolment of any person after said date."

The section also contained a special provision as to the intermarried white Cherokees whose cases were then pending in the Supreme Court of the United States.

This court in the Redbird case held that intermarried whites in the Cherokee Nation had no property rights unless married prior to 1875.

Section 3 provided:

> "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence

> in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrolment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrolment by the Secretary of the Interior."

By Section 19 restrictions on alienation were removed from all lands except those of full bloods.

Assignment of Errors.

1. The Court of Appeals erred in overruling the original judgment of the Supreme Court of the District of Columbia, directing that mandamus should issue and in affirming the final judgment of the District Supreme Court dismissing with costs the petition of the present plaintiffs in error.

2. The Court of Appeals erred in holding in substance that after enrolment and allotment and issuance of allotment certificates, the Secretary of the Interior still had jurisdiction over the approved rolls and over allotments and could cancel the enrolments and allotments of plaintiffs in error.

3. The Court of Appeals erred in not holding that after the approval of the rolls containing the names of plaintiffs in error, and, prior even to allotment, the jurisdiction of the Secretary of the Interior was exhausted, and in holding that after such approval he still was vested until March 4, 1907, with jurisdiction and authority, after notice and hearing, to cancel enrolments duly and regularly made.

4. The Court of Appeals erred in holding that the Act approved April 26, 1906, did not expressly prohibit the

Secretary of the Interior from canceling the enrolment of plaintiffs in error, made prior to the approval of said act.

5. The Court of Appeals erred in not holding that the Cherokee Treaty of August 11, 1866, plainly and manifestly did not require former Cherokee slaves to return within six months, but only free persons of color, and in holding that the Secretary of the Interior under said treaty lawfully could strike the names of plaintiffs in error from the approved Cherokee rolls by finding their ancestor returned to the Cherokee Nation subsequent to Feb. 11, 1867.

6. The Court of Appeals erred in not holding that the fact that plaintiffs in error, or their ancestors, were on the Kern-Clifton roll made pursuant to the Court of Claims' decree in the Whitmire case, was an adjudication of their rights as Cherokee citizens and prevented the cancelation of their names from the rolls approved by the Secretary of the Interior.

ARGUMENT.

Counsel for plaintiffs in error contend under the conceded facts that the plaintiffs in error were duly placed on the rolls approved by the Secretary of the Interior and were allotted lands to which they were given allotment certificates, that they thereby acquired vested rights, that the Secretary of the Interior (at least in the absence of a clear, express authority to forfeit or cancel a vested right) then had no authority or jurisdiction in the premises, and that the case under the conceded facts of enrolment and issuance of allotment certificates is concluded in favor of plaintiffs in error by the decisions of this

Court in the Goldsby and Allison cases, 211 U. S., 249-65, and the Belle Frost case, 216 U. S., 240, executive officials having no power to cancel or forfeit a vested interest.

The Goldsby case concerned enrolments in the Choctaw Nation and the Allison case enrolments in the Cherokee Nation, for substantial purposes the statutes relating to the two tribes being the same.

The Court of Appeals has attempted to distinguish the instant case by holding that in the Goldsby and Allison cases all that was decided was that the Secretary of the Interior could not strike names from the rolls without notice or hearing and that in the Belle Frost case there was no decision that with allotment of land and the issuance of allotment certificates vested rights had accrued, but that it was a case decided on the facts and not on principle as to what an allotment certificate amounts to.

Counsel respectfully submit that an examination of those cases will show a misapprehension of what this Court decided in those cases, and that taking the two cases together, it is plain and clear that this Court has ruled that an allottee in the Five Civilized Tribes who, subsequent to enrolment, selected land for which he was given an allotment certificate, thereby acquired vested rights, of which the Secretary of the Interior, an executive officer, could not deprive him, and they believe the Court has intimated enrolment alone conferred a vested property right.

When the Goldsby and Allison cases were before this Court it was insisted by counsel for the Government that the courts had no jurisdiction because the matter of enrolments and allotment was within the exclusive juris-

diction of the Secretary of the Interior. It was insisted on the other hand, by present counsel for the Indians, that the case was not similar, as the Government contended, to the jurisdiction of the Secretary of the Interior over the public lands, as to which Congress, subsequent to the decision in Lytle vs. Arkansas, 9 How., 333, had adopted legislation specifically conferring upon the Secretary of the Interior the right to set aside receivers certificates and at any time prior to patent to undo acts whereby parties seeking public lands under the general public land laws claimed they had acquired rights of which they could not be divested, and that these Indian partition statutes had conferred no revisory power upon the Secretary once he approved a roll, but had made enrolments, when once approved, final, and restricted his authority over specific allotments to a period of nine months, and that if recourse was to be had to analogy the Indian statutes should be compared with special statutes such as that involved in Noble vs. Union River Logging Co., 147 U. S., 165.

This Court, in its decision in the Goldsby case, said:

> "But the question presented for adjudication here does not involve the control of any matter committed to the land department for investigation and determination. The contention of the relator is that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls and the same had been certified to the Commission and he had received an allotment certificate and was in possession of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted and not within the authority and control over public land titles given by the Interior Department.

> "By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls he had not only become entitled *to participation in the distribution of the funds of the Nation* (italics ours), but by the express terms of Section 23 of the Act of July 1, 1902, it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein. We have, therefore, under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any Act of Congress."

The Court then cited the case of Noble vs. Logging Co., supra, and said:

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this Court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been confirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The Court said that it had been always recognized that one who had acquired rights could not be deprived

of them "without notice and an opportunity to be heard" and added:

> "The right to be heard before property is taken or rights or privileges withdrawn, which had been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this Court."

Counsel for plaintiffs in error respectfully insist that while there might be room for a contention that this Court had limited its decision in the Goldsby case to the proposition Goldsby's name could not be stricken from the rolls without notice and a hearing, that they believe the Court did more than intimate an opinion that his name could not be stricken from the rolls at all, with or without notice.

But it being conceded that allotment certificates have issued, it is respectfully submitted that the opinion in the Goldsby case, taken in conjunction with the subsequent opinion in the Belle Frost case, settles absolutely the question that with the issuance of the allotment certificate the rights of plaintiffs in error became absolutely vested, and hence is controlled by the Goldsby decision and by Noble vs. Logging Co., supra.

In the Belle Frost case, Belle Frost had been allotted a tract of forty acres of land and an allotment certificate had issued to her. The principal chief and governor of the Choctaw and Chickasaw Nations respectively, signed a patent, and when the same came before the Secretary he refused to sign or issue the patent, on the ground that

he had decided to and had, after allotment and issuance of the certificate, concluded the land was needed for town-site purposes and should be sold for town-site purposes. Belle Frost contended that rights had vested in her under the allotment certificate of which she could not be divested by any act of the Secretary.

This Court held:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation."

The Court then held that parties had nine months prior to issuance of the allotment certificate within which to question the title of an allottee, and that "thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered." It held that under the statute after nine months "the title of the allottee to the lands selected became fixed and absolute," and cited as authorities for its holding that issuance of patent should be coerced by mandamus and that vested rights had accrued various decisions under special acts, to which reference is here made.

The Court of Appeals in its second opinion, when the Belle Frost case was called to its attention, attempts to distinguish this case by holding that inasmuch as Belle Frost's right to some allotment was not assailed and her right to enrolment was not attacked, that the opinion of

this Court had simply held that as she was entitled to enrolment and allotment, the Secretary could not take away a particular forty acres covered by her allotment because he desired that forty for town-site purposes; that as she had "a lawful right to select the land, and having done so, the Secretary was powerless to divest her of that right."

In the present case the Court says:

> "The relators wrongfully secured their enrolment and allotment," and they were obtained "without authority of law."

A similar contention was made by the U. S. in Noble vs. Logging Co., supra, that the approval of the railway company's map was without authority of law, but was overruled as confounding jurisdiction and correctness of a jurisdictional act.

It is respectfully submitted that the distinction is without merit; that the statement enrolment and allotment were obtained "without authority of law" is absolutely unwarranted because the law specifically conferred upon the Secretary of the Interior the right of enrolment and allotment, and the entire case of plaintiffs in error is based upon the proposition, which the defendant in error does not attempt to refute, that the Secretary of the Interior did have jurisdiction as to enrolments and allotments. The remark of the Court confounds jurisdiction with correctness of decision. The correctness of the decision enrolling and allotting the plaintiffs in error cannot be open to review because it depended upon consideration of facts and construction of law, and therefore, jurisdiction existing, the judgment entered is valid, regardless of whether or not it was correct as matter of fact and of law, because being vested with jurisdiction

the decision rendered in the exercise of jurisdiction is one that can be attacked, if at all, only in a court of equity. To hold the Secretary could not take away a particular 40, but could an entire 320 acres, seems to counsel wholly illogical and not based on any legal principle.

The subsequent opinion of the Court of Appeals also intimates that the plaintiffs in error are not entitled to any relief, because if their contention be true, their rights being fixed by law, could not be destroyed by the act of the Secretary in erasing their names from the rolls. It is respectfully submitted that these remarks of the Court are entirely inconsistent with its decision in the Goldsby case, wherein, when the Assistant Attorney General advanced a similar proposition, the Court held (30 App. D. C., 177) that mandamus would lie and that—

> "a cloud has been cast upon his right to the land allotted to him that will prevent his obtaining his patent; and his right to share in the distribution of the tribal funds dependent upon his recognized enrolment has been impeded, if not finally destroyed."

It is likewise respectfully submitted that the Court below did not give the due recognition it should have to the opinion of this Court in the Goldsby case, holding that mandamus should issue to correct the rolls, and hence, necessarily that the striking from the rolls did affect the enrolled party's right "to participate in the distribution of the funds of the nation, together with his right to patent to the lands allotted."

But were the matter not stare decisis in this Court, but an original proposition, we submit that under the statutes and authorities the Court would reverse the decision below.

The Secretary of the Interior Neither by Express Grant Nor Necessary Implication was Given Authority to Strike Names From Final Approved Rolls. His Jurisdiction Ceased With Approval of Final Rolls. Enrolment Conferred Vested but Undivided Rights in Tribal Lands and Funds. Allotment a Vested Right in a Designated Tract.

The jurisdiction of the Secretary of the Interior with reference to the rolls of the Five Civilized Tribes is derived entirely from the statute law with reference to those tribes, such statutes to large degree being the result of solemn agreements in the nature of treaties between the several tribes and the United States. Repeated opinions of this Court have established that executive officers of the Government have such authority and jurisdiction, and only such authority and jurisdiction, as the statutes give them, either expressly or by necessary implication, and as incidental to the express powers conferred. If this be true of statutes in general, the rule should have a strict application in the pending cases where the statutes really are conventions between the United States as *parens patriae* of the Indians and the Indian nations for the partition in kind and money of the vast tribal estates among the tribal members, among the consenting parties being plaintiffs in error as freedmen receiving citizenship rights in the nation and participating heretofore in the Kern-Clifton roll distribution.

Under the statutes relating to enrolments and allotments in the Five Civilized Tribes Congress conferred on the Secretary of the Interior jurisdiction, with the aid of the Commission to the Five Civilized Tribes, otherwise known as the Dawes Commission, to enrol persons

claiming citizenship in any of the Five Civilized Tribes and to allot to those enrolled their equal share in the lands and funds of the tribes. Receipt of an equal share of tribal lands and funds followed inevitably and inseparably and as a necessary consequence of enrolment, for to have held a person entitled to enrolment as of Indian blood and to be a descendant of the Indians who took the lands in the Indian Territory in exchange for lands east of the Mississippi, and yet not entitled to an allotment, would have been in violation of treaties and of the terms of the patents under which the Indian Nations held the lands (Rec., p. 2), and of Secs. 29 and 31 of the Cherokee agreement of July 1, 1902.

The primary purpose of Congress in undertaking the work of enrolment and allotment was expressed in the act of March 3, 1893 (27 Stats., 645—Kappler, Vol. I, 498), creating the Dawes Commission to be "the extinguishment of the national or tribal title" * * * "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." In other words, as a matter of national policy Congress was determined on the abolition of the communal tenure of land in the Indian Territory (which Territory, equally as a matter of national policy, earlier had been created as a home for Indians generally in pursuance of a centralization policy like communal Indian land tenure, that by 1890 had outlived its usefulness if it ever had any); the division of the soil among the Indians, and the adoption of such other measures as would fit both the country and the people for American statehood. This was the primary purpose or keystone of all Congressional legislation and after 1902 events moved rapidly to this result. The later legislation removed

restrictions, tended toward development, made the land taxable and contained other provisions absolutely inconsistent with the idea that approval of rolls as presented was only preliminary or tentative and not final. See Johnson vs. Towsley, 13 Wall., 83, construing the word final in a land statute.

The necessity for the United States undertaking the work of enrolment was thus stated in the report of the Dawes Commission of November 18, 1895:

> "The Commission is of opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated and many good and law-abiding citizens reduced to beggary."

We have stated the foregoing at the outset because we believe a statement of the primary purpose of and necessity for Congressional action of value in consideration of the statutes and to be a correct rule for their interpretation, and because we believe the national policy enunciated of settlement, improvement and upbuilding of the country inconsistent with the claim of defendant in error of an implied power to undo and to disturb rights of property at will, and that enrolled members and allottees and their vendees took lands, and held claims, to an undivided interest in tribal funds, subject to constant re-determination of their right thereto by the Secretary of the Interior; that his approval of partial lists was merely tentative.

In the initial legislation providing for enrolments embodied in the act of 1896, provision was made for trial of rights only of persons not on tribal rolls, but who claimed right to citizenship notwithstanding, the tribal

rolls being by the act confirmed in express terms. This confirmation of tribal rolls was fought by the Indian Nations on the ground that injustice to the nations would result if inquiry into tribal rolls was barred, inasmuch as persons were to be found thereon never entitled and whose place thereon was a fraud. Gradually by successive statutes the Indian Nations lessened the extent of confirmation of tribal rolls. In response to their allegations against the verity of their own rolls comprehensive legislation was obtained (Curtis act of June 28, 1898). By this act direction was given the Dawes Commission to investigate all rolls save certain designated and confirmed rolls, the direction as to the Cherokee freedmen being that "it shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims, rendered the third day of February, 1896." This act was tried for nearly four years. Under it advancement was not made in the primary purpose of Congress to secure severalty instead of communal land holdings, and to fit the Indian Territory for statehood, because by its express terms, Section 11, no citizen could be considered enrolled until "the roll of citizenship of any one of said nations or tribes is fully completed as provided by law." Under this the Secretary would have approved simply an entire tribal roll. Until this was done and the survey of the lands of the tribe, whose enrolment was completed, also was completed, the Dawes Commission could not "proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe," mineral rights being reserved to the tribe as a whole and mineral leases made by the Secretary of the Interior and not by the citizens. Moreover, by this same act severalty was still some

length of time in the future and the Indian Territory still unprepared for statehood after the completion of the enrolments in any one tribe because there would be no allotments of land to the enrolled citizens and no person would have an individual title until the entire work of allotment of lands to the particular tribe in question was wholly completed, Section 11 providing: "When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval." And no person had even a full possessory right to the land he might occupy because Section 12 of this act provided: "That when report of allotments of land of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act."

When Congress passed this act it evidently expected within two or three years that the work would be completed of enrolments and allotments, and to this end it, by the Indian Appropriation Act of July 1, 1898 (30 Stat., 591) made provision for the speedy disposition of appeals, to be taken direct from the United States courts in the Indian Territory to this Court. By the acts of May 31, 1900 (31 Stat., 221), and March 3, 1901 (31 Stat., 1073), it endeavored to speed enrolment matters, and in that effort by the latter act directed the Secretary of the Interior "to fix a time by agreement with said tribes, or either of them, for closing said rolls, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

Time went on and in 1902 there was still no rolls of any one of the Five Tribes and, of course, allotment had not yet begun. Congress effected agreements first with the Creeks and, an agreement in 1901 with the Cherokees failing of tribal ratification, finally in 1902 with all the Five Civilized Tribes, the effect of which, as shown by Section 73 of the Cherokee agreement, approved July 1, 1902, was to repeal practically all the provisions of the Curtis Act of 1898 so far as concerns enrolments and allotments because inconsistent with that act.

It is under these 1902 agreements that enrolments and allotments have been made in the Five Civilized Tribes and that the Indian Territory was prepared for admission as part of the State of Oklahoma. The agreements marked radical departures from the Act of 1898 as to enrolments and allotments. It was in these vital respects, as to fitting the territory for statehood, a right-about-face change in Congressional policy. A contrast between the language of the law of 1898 and the agreements of 1902 and what could be done under them makes this clear to a demonstration.

The law of 1898 made approval of enrolments dependent on completion of the rolls of an entire tribe and the Secretary's approval under it would await the finish of enrolments of an entire tribe. Allotments would not be attempted until an entire tribe was enrolled and until the land of an entire tribe was allotted and the same approved by the Secretary, there would be no allotment to any tribal member. The Secretary's control thus rested until the last and likewise continued the impossibility of transfers of land, upbuilding of the community by individual enterprise and taxation of the great source

of State support and the chief wealth of the community, its lands. By Section 11 the lands were specifically declared non-alienable and non-taxable until full title was acquired.

By the Cherokee agreement of 1902, enrolment and allotment went hand in hand. Enrolments were made in partial lists, as provided in Section 29, and these lists were approved as rapidly as enrolment rights of individuals were decided, and these partial lists were made "part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other property shall be made." The roll was declared complete when all cases were acted on. Pursuant to the same section, lands were allotted those enrolled as rapidly as their enrolments were approved, and they selected their lands, and in the absence of contest between citizens, as to their preferential right to lands selected, certificates of allotments were issued to them for the lands selected after the expiration of nine months. The law declared these allotment certificates "conclusive evidence" of the right of the allottee to the land selected and directed allottees should be put in physical possession, if need be, of the lands described in the certificate, and patents in due form followed. From the date of selection of their allotments, under the law allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes. They also, from the same date, created town sites where practicable and sold town lots, with their title resting in their allotment selections or certificates. The Oklahoma Supreme Court has declared these contracts valid from date the lands were selected, unless the allottee was under disability as a restricted Indian.

McWilliams Inv. Co. vs. Livingston, 98 Pac., 914; Godfrey vs. Iowa L. & T. Co., 95 Pac., 792 (after allotment certificate).

Long before the roll was closed, March 4, 1907, thousands of enrolled citizens had their restrictions removed by the Secretary of the Interior and were permitted by him to alienate their lands; thousands more leased their lands for oil and gas purposes and their leases were approved by the Secretary of the Interior, with no patent yet issued to them to the land at the time. Congress, by several acts, removed restrictions on large general classes of enrolled persons until by the summer of 1906, with the roll yet open, the only persons requiring assent of the Secretary to removal of restrictions on alienation of their lands were full blood Indians and others of more than half Indian blood. No such things could have been possible under the Act of 1898. From the time they became possible individual land ownership, transfer and devolution became possible in Oklahoma and from that time the community developed and became fit for statehood and subject to taxation.

Is it not apparent therefore that the agreement of 1902 made enrolment and allotment final as rapidly as the Secretary acted in any given case and, instead of waiting for completion of enrolments or allotments as to an entire tribe approved and adjudged in each individual case presented, development of the country thus proceeding, *pro tanto*, without awaiting the laborious ultimate completion of enrolment and allotment of an entire tribe.

No express authority was conferred on the Secretary of the Interior or any one else to cancel a name on the

final approved roll. We understand counsel for defendant in error and the court below do not contend that there was in terms any authority granted the Secretary of the Interior to strike names from the final rolls he had approved. No implied authority was given unless it be derived from his general supervision of enrolments or from the direction in the Act of 1898 that the rolls should be correct rolls. The use of this term "correct" in the Curtis Act of 1898 obviously was what the law made the Secretary's duty anyhow, but it is clear it was an adjective used because of the direction to investigate and purge tribal rolls.

Forfeitures by implication are not favored and so likewise of authority to unmake from the authority to make. A court or a more limited *quasi* judicial tribunal can pronounce judgment; it cannot, except in strict pursuance of authority conferred, vacate and set aside that judgment once entered. The direction that the tribal rolls and claims of others should be investigated and that then the Dawes Commission and the Secretary should make rolls in lists, which when approved should be final, carries with it no implication of revisory power, but in connection with the entire legislation merely evidences the declaration of the law-making power that the rolls as made by the tribes were not to be accepted unchallenged. The direction as to making a roll in partial lists meant no more than this, and cannot be held to imply a continuing grant of power to reverse, review and revise action at any time up to the day of completion of the entire work of enrolment, any more than a statute providing that a justice of the peace shall decide a controversy according to the very right of the matter, authorizes the justice to open suits anew at any time because of

a change of mind after he had rendered final judgments, or a condemnation act, authorizes a body after it has announced its award for a certain block of land and entry thereof has been made, and even acceptance signified, by the property owner to reopen its awards, after months or years, and then on some changed rule as to property values to make new awards, because it was directed by the act to award owners of land the true value thereof, although given no express authority to reopen awards, and no implied authority, except that its awards were to be true awards.

The primary purpose Congress had in mind is inconsistent with revision of final enrolments by the Secretary. The Territory could not be prepared for statehood by a constant unsettlement of the basis of all prosperity in a new country, namely, security of property rights and titles. Revision of enrolments likewise is inconsistent with the terms of the Act of 1902, by which it was expressly directed in pursuance of the national policy under which Congress, in 1893 and 1896, began the work, that final enrolments should be made in lists which, when approved by the Secretary of the Interior, should be "part and parcel of the final rolls upon which allotment of land and distribution of other tribal property shall be made." This and all the other legislation evidence that enrolment meant allotment and an interest in tribal funds or other property, the tribal funds in the U. S. Treasury of each tribal aggregating millions of dollars, part of which, prior to 1907, was distributed in the case of the Choctaws and Chickasaws on the basis of the "partial lists" constituting part and parcel of the final roll, so that if the rolls were not final the distribution was premature.

If not entitled thereto then to the extent of the canceled persons share of payments made him, all other tribal members have been deprived of their just due. The disbursing officers have paid out money wrongfully and perhaps are liable.

Beneath the surface of the land in many allotments valuable oil pools have been discovered and the allottees have been permitted to and have leased the same on a royalty basis or have operated oil wells themselves. The result has been to put royalties or cash into the pockets of the allottee, and, where leased, to permit strangers to take from the land its wealth by contract with a party having no rights in the land. The land has been denuded by strangers to the title, to the spoliation of those entitled thereto. This has been accomplished by approval of leases by the Secretary of the Interior and in some cases of the courts.

Of the claim advanced in the answer of defendant in error, that the practice of the Secretary of the Interior in striking names from the approved rolls because he felt he had approved enrolments by mistake was notorious and widely extended, counsel submit that this is insufficient to establish knowledge and approval by Congress of such a misconstruction of the plain terms of the law.

The answer says the striking of names was in accordance with the Secretary's "long established and well recognized practice," his predecessor "as the approved rolls of the Five Civilized Tribes in respondent's possession show, having struck several hundred names from said approved rolls during that time (1902 to 1907), because they had been found to have been unlawfully or improperly enrolled." The practice may have been

well recognized in the department and the department's practice in the case of a doubtful and ambiguous statute would be entitled to judicial weight in construction of the statute, but not otherwise, and here we have a plain statute and the rules applicable that statutes are to be construed by the primary purpose of the law-making power by what may be done under them (Beavers vs. Henkle, 194 U. S., 73), and that a construction must be avoided which will lead to unjust or absurd consequences.

After diligent search counsel have been able to discover only two references in any government report or document that mentions elision of names from rolls in the Five Tribes. In the annual report of the Department of the Interior for 1905, Part 1, Indian Affairs, page 609, there appears the following:

> "From the approved roll of the citizens by blood of the Choctaw and Chickasaw Nations the names of 1,101 persons have been canceled owing to duplicate enrolments, or the fact that such citizens died prior to September 25, 1902, and the names of 170 persons have been canceled from the schedules of the Choctaw and Chickasaw freedmen for the same reasons, leaving as the actual number of persons entitled to allotment 34,367."

In the annual report for 1906, Indian Affairs, page 621, this appears:

> "In spite of the pains taken by the Commission to make the final rolls accurate from the start, a number of names were placed thereon which should have been omitted, because the persons

> died prior to September 25, 1902, and were not entitled to enrolment. These frauds did not develop to any great extent until the work of allotment was commenced. Then it was discovered that the names of many Choctaws and Chickasaws who died prior to September 25, 1902, were included in the final roll."

Striking out a duplication of names obviously involved deprivation of no property rights, and dead persons could make no protests, and, moreover, there was specific authority to prevent persons dying too soon obtaining rights, for the Choctaw and Chickasaw agreement, approved July 1, 1902 (32 Stats., 641—Kappler, Vol. I, 776), in section 35, declared:

> "Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on the said rolls and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement."

A similar provision is found in Section 31 of the Cherokee agreement of 1902. It was eminently fit and proper and authorized by the above section that notations should be made on the rolls that persons enrolled had died too soon and could not share in the distribution of lands and funds because their rights had been extinguished in favor of the tribe in general.

Obviously the report acquainted no one with the fact live persons were being stricken.

The Secretary Having Jurisdiction to Approve His Action in That Respect is Not Subject to Review. But with Approval His Jurisdiction was Exhausted and Subsequent Attempted Cancellation Therefore Arbitrary and Without Authority of Law and Hence Controllable by Mandamus.

In Garfield vs. Goldsby, 211 U. S. 259, this court held: "We are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law."

By the Cherokee agreement and other acts the Secretary of the Interior was invested with jurisdiction over enrolments and authority to approve rolls containing names of persons he found on the facts and law to be entitled to enrolment. That approval being pursuant to authority vested in him is not open to review.

> Steel vs. St. L. Smelting Co., 106 U. S. 228.
> Johnson vs. Towsley, 13 Wall, 83.

As said by this Court in Riverside Oil Co. vs. Hitchcock, 190 U. S., 323:

> "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction."

> Daniels vs. Tearney, 102 U. S., 418.
> Foltz vs. St. L. R., 19 U. S. App., 581.

The extent of his investigation and knowledge of the points decided (though plaintiffs in error insist the original determination was true and correct), or the methods by which the Secretary reached his determination is not open to review.

De Cambra vs. Rogers, 189 U. S., 121.

Having approved the partial lists constituting part and parcel of the final roll, the Secretary had exhausted his discretion and power was gone except it were specially invested in him. His approval of enrolment ended authority in him. The statutes conferred no further power or authority upon him, and in the absence of statutory authority to proceed further and to cancel, his jurisdiction had ceased and determined. Once declared to be citizens of the tribe by operation of law the plaintiffs in error became entitled absolutely and of right to a vested interest in tribal lands and funds, and with the issuance of an allotment certificate that individual but vested interest in the tribal lands became a vested interest in a separate and distinct tract of land as the enrolled's separate partited share of the tribal landed estate.

Ballinger vs. Frost, 216 U. S., 240.
Wallace vs. Adams, 143 Fed., 721.

However vast his power may have been in the Indian Territory, the grant of authority to enroll was but to make of the Secretary of the Interior a special tribunal of limited jurisdiction. It is hornbook law that such tribunals are in their powers strictly limited by the terms of

the statute creating them and cannot exceed their granted powers. As applied to executive officers this doctrine is thus expressed:

> "Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject matter, but he must also keep within the limits of the power conferred on him by statute."
>
> United States vs. McDaniel, 7 Peters, 1-14.
> United States vs. Thurber, 28 Fed. Rep., 56.

Any contention that because of his general power of supervision over enrolment, allotments and the Five Civilized Tribes the Secretary must be held to have power to cancel enrolments which he ascertains he has approved by reason of fraud or mistake of law, counsel think can best be answered by citation of the case of Mosgrove vs. Harper, 33 Oregon, 252, wherein it was held that the Secretary was without authority for any cause to cancel a once approved lease. An Indian woman had leased certain lands upon terms and conditions prescribed by the Secretary of the Interior and with his approval. Subsequently the Indian allottee alleged the lessor had obtained his lease by fraud and duress. After a hearing the Secretary of the Interior found the allegations to be true and ordered the lease canceled. The Supreme Court of Oregon found that the statutes did not directly or indirectly "authorize the Secretary of the Interior or any other special tribunal to cancel or annul a lease made by an Indian allottee after the same has been approved by him." As to the contention that the Indian was a ward of the Government, that the Secretary of the Interior was specially charged with administration of Indian affairs,

and that the power claimed was necessary to the protection of these wards of the nation, the Court said:

> "But a sufficient answer to this contention is that no such power has been conferred upon him, and that the courts of the country are constituted for the purpose of administering appropriate relief in such cases. And the assumption of a power not conferred by law finds no justification in the fact that a mischief may be thereby suppressed, or a particular right maintained. If, in the administration of Indian affairs, such a power ought to have been vested in the Secretary of the Interior over contracts of leasing made by the allottees, Congress alone could have conferred it. But, no such power having been conferred, its existence must be denied."
>
> See also Noble vs. Logging Co., Supra.

If enrolment, as seen, conferred an undivided but property right in lands and funds and allotment a right in a divided, segregated tract then a power in the Secretary to cancel the enrolment would mean he had authority of forfeiture vested in him. He claimed such authority even after issuance of patents (see the Allison cases in 211 U. S.). Assuming it to be within the law-making power to vest in the Secretary as a special tribunal the power of forfeiture of acquired property rights it must be conceded that it would be a radical departure of our policy of government to vest such authority in an executive officer and hence under the rule of statutory construction that no radical departure in legislation is to be presumed or implied the grant of such power must appear expressly or it cannot be held to have been conferred. The Court below admits the literal wording of the acts of Congress confer no power of cancellation or control over the roll

after rights have been acquired but seeks the power in some supposed liberal construction that it thinks Congress must have intended. We have shown, we believe, the liberality Congress intended was in accomplishing enrolment and allotment and fitting of the community for Statehood thereby as rapidly as possible.

Mr. Justice Brewer, who wrote the opinion in the Belle Frost case, in Richardville vs. Thorp, 28 Fed., 53, held: "He (the Secretary) has no judicial power to adjudge a forfeiture." This Court in the case of the New York Indians, 170 U. S., 1, held forfeiture could result of property rights in only one of two ways, namely, by a legislative declaration of forfeiture or by proceedings in a court of equity.

The Case at Bar is Not by Analogy to be Likened to the General Land Laws. If it is to be Compared With Those Laws the Analogy Must be With the Old Land Laws Decided in Lytle vs. Arkansas and Not the Modern Land Laws Which Expressly Confer Revisory Power on the Secretary Until Patent Issues.

Counsel for defendant in error in all litigation over enrolments and allotments in the Five Tribes has persisted in citing in support of their contentions decisions with reference to the general land laws and the power of the Secretary after receivers certificates have issued. Congress was not dealing with the public lands as to which no person has any rights but with partition of a vast tribal estate among its thousands of co-parceners having just claims to a fair, equal division. But, moreover, the law as to receivers' certificates was not always in its present form. It took express legislation to con-

fer power on the Secretary of the Interior where receivers' certificates to public lands had issued and the change in the statute naturally was followed by a change in the current of judicial decision.

Lytle vs. Arkansas, 9 How., 333.
Orchard vs. Alexander, 157 U. S, 372.

The right to public lands is not complete until the action of the register and receiver of the Land Office is approved by the Commissioner of the General Land Office and the Secretary of the Interior, because by statute they now are vested with supervisory control; but under the general land laws there are stages at which their action is beyond recall.

U. S. ex rel. McBride vs. Schurz, 102 U. S., 407.

As to enrolments this stage in the statute was reached when the Secretary approved the roll containing the names of plaintiffs in error.

The cases arising in this Court under special acts go much further and are more nearly analogous to the situation presented by the issuance of allotment certificates. The allotment certificates, like certification of lists of lands under the special acts, convey a title as complete as patents.

Among these cases are Fraser vs. O'Connor, 115 U. S., 102, where it was held: "Lists of land certified to the State by the Commissioner of the General Land Office, and the Secretary of the Interior, convey as complete a title as patents"; Noble vs. Union River Logging Co., 147 U. S., 165, wherein it was held that after the Secretary had determined that the facts as to a certain railway brought it within a certain class, and had approved the profile map of the road, he could not, when later con-

vinced that his approval had been obtained by fraud, cancel or take away the rights conferred by executive act, but must proceed in court.

Other cases in point are:

Stark vs. Starr, 6 Wall., 402.
Barney vs. Dolph, 97 U. S., 652.

As said in Butterworth vs. United States, 112 U. S., 50, "each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature."

The Concession Plantiffs in Error Ancestor Was a Cherokee Slave at the Commencement of the Rebellion Shows them Entitled to Enrollment and Cancellation Not Only Without Jurisdiction but Without Merit or Justice. Former Slaves Were Not by Treaty Required to Return Within Six Months, But Only Free Persons of Color.

Counsel for defendant in error assumes that plaintiffs in error originally were wrongfully enrolled, that under the Cherokee treaty of 1866 and the Cherokee agreement of 1902 and Acts of Congress, they were not entitled to enrolment and upon that predicates a conclusion their enrolment was *ultra vires* and null, and that the Secretary of the Interior had authority to vacate the enrolment. The conclusion would not follow from the premise and the premise is not well founded. The Secretary had jurisdiction and within his jurisdiction he might decide rightly or wrongly but except for plain error of law the courts could not control him. But, the treaty makes a clear distinction between former slaves

and free negroes, and only the latter class were required to return within six months. Under any other construction it is impossible to conjecture why the treaty is worded as it reads. No judicial determination to the contrary ever has been rendered though an assumption is made incorrectly that the Court of Claims had so decided upon some issue before it.

The rights of Cherokee freedmen were fixed beyond impairment by Article 9 of the Cherokee treaty of August 11, 1866 (14 Stat., 799), whose material part reads as follows:

> "They further agree that all freedmen who have been liberated, by voluntary act of their former owners or by law as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees." (Correct punctuation as per original treaty in the State Department.)

That the words "as well as" were intended to create two classes of negroes, aside from the contemporaneous construction given to which we later shall come, is shown by Article 4, which reads: "All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation," etc.

Other provisions of the treaty contemplated the exclusion of intruders, that is, unauthorized persons, from their territory.

November 26, 1866, the Cherokees amended their constitution so as to admit negroes to citizenship as required

by the treaty and carefully preserved the treaty distinction between the two classes of negroes. They continued their intruders laws and the government reports show frequenty called on the U. S. to remove intruders.

Incidentally it may be remarked here and will be shown later citizenship meant property rights.

The other four Civilized Tribes each made treaties with the United States and each provided for property rights for the former slaves.

The language used in the Cherokee treaty and subsequently carefully reiterated in Cherokee laws is inexplicable on any ground save an intent to distinguish between former slaves and former free negroes. The Cherokees had no slaves save negroes, as is matter of history which the court will judicially notice, and not all of them had slaves, while in the Nation there were free negroes at the outbreak of the war. Some slaves their masters liberated and others the Cherokees by law manumitted in 1863. It is a principle of statutory construction that effect shall be given if possible to every word used by a legislature, that no word or phrase shall be presumed to be used needlessly if another clear and sensible meaning can be deduced and that attention shall be paid ordinarily to the collocation of words and to punctuation. Violence would have to be done each of these principles of statutory construction to hold that no distinction was made between former slaves and free negroes.

The history of the times accords with the construction and interpretation the words as arranged would suggest naturally.

The Cherokees sided with the Confederacy and in 1861 made a secret treaty with the South, to whom they lent much aid and many soldiers and whose cause they sought

to have other Indians espouse, while making some pretense of neutrality and sympathy for the North. Towards the close of the war their duplicity and the secret treaty were discovered. The negroes, as far as was possible, naturally had aided the North. The result of discovery of the Cherokee double dealing was that the United States was incensed at the Cherokees to a greater extent than toward those Indians living further South and who had sided with the South as with neighbors. The United States treated the southwestern Indians as having abrogated their treaties by aiding the rebellion, and in 1865 sent a commission to negotiate new treaties with the Indians on less liberal lines.

The Annual Report of the Commissioner of Indian Affairs for year 1865 (page 38), says:

> "Of the Cherokees, all of the Nation at first joined the rebels, including all factions, of full and mixed blood. Regiments were raised by the order of the party in power, then and now the majority, called the Ross party, which regiments fought against the Union forces at Pea Ridge and on other occasions. All seem to have agreed as to their course of action down to the fall of 1862, when a portion of the troops, under Col. Downing, second chief, and a majority of the Nation, abandoned the rebel cause and came within our lines. About 6,500 of the more wealthy portion still continued to co-operate with the South till the close of the war, and about 9,000, early and late, came back to their allegiance."

The proceedings of the Southern Indian Treaty Commission are set forth in the report of D. N. Cooley, president of the Southern Treaty Commission, incorporated in

the report of the Commissioner of Indian Affairs for the year 1865, commencing at page 296.

The report, after stating that the Commission on September 8th, 1865, met the Indians of the Southwest in Council, included an address by the Commissioners to the Indians in which the statement was made that the Cherokees, Seminoles, Creeks, Choctaws and Chickasaws and certain other Indians by entering into treaties with the Confederacy had forfeited and lost all their rights to annuities and lands, but that the President was willing to renew these relations upon certain conditions.

These conditions so far as here relevant were stated as follows (p. 298):

Such treaties must contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery, or involuntary servitude, shall never exist in the tribe or nation, except in punishment of crime.

7. No white person, except officers, agents, and employes of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribes, according to the usages of the band.

The Cherokee Delegation responded denying that they

had been guilty of treason or had forfeited their rights, and in reply thereto the treaty commissioners responded, stating that they found that the Cherokee Nation had, October 7, 1861, made a secret treaty with the so-called Confederate Government, and that the Principal Chief of the Cherokee Nation, then and now John Ross, had written, published and spoken in favor of this wicked alliance, for many months before the treaty was made, and that he further had endeavored to induce the Creek patriot, O-poth-le-yo-ho-la, to induce the Creek Nation to side with the Confederacy. The treaty commissioners said that the plea "not guilty" put in by the Cherokees, therefore, would not lie, and that the facts claimed by the Cherokees, namely, that they had been forced into an alliance with the Confederacy, would only go in mitigation, and that so long as John Ross was their Principal Chief the United States would hold the Cherokee not loyal.

Later the Commission declined to recognize John Ross as Principal Chief of the Cherokees (p. 304).

E. C. Boudinot, in behalf of the Southern Cherokees, said (p. 306) that they accepted the abolition of slavery as a fact accomplished, but submitted that it would neither be for the benefit of the emancipated negro, nor for the Indians to incorporate the former into the several tribes on an equal footing with the original members. That the emancipated negro must be suitably provided for was a natural sequence of his emancipation, but they asked further time to consider so delicate a matter.

Later the Commission again reiterated its instructions.

The loyal Choctaws through William S. and Robert B. Patton accepted (p. 320) the first six articles, but suggested that the seventh article should be modified to read:

> "No white person, except officers, agents, and employes of the Government, or of any internal improvement authorized by the Government of the United States; also, no person of African descent except our former slaves, or free persons of color who are now, or have been, residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band."

The Seminole Nation answered as follows:

We fully and freely indorse all the propositions contained in your address, excepting that we respectfully submit that Article III should be so changed as to admit only colored persons lately held in bondage by the Seminole people, and free persons of color residing in the Nation previous to the rebellion, to a residence among us, and adoption in the Seminole tribes, upon some plan to be agreed upon by us and approved by the Government. *We are willing to provide for the colored people of our own nation, but do not desire our lands to become colonization grounds for the negroes of other States and Territories.* (Italics ours.)

On September 12, 1865 (p. 327), the Treaty Commissioners informed the Cherokees that they were by reason of their acts during the rebellion "as a Nation legally, morally and of right ought to be, as you are, subject to the will and pleasure of the President of the United States touching your interests under any former treaty or treaties with the United States affecting annuities or titles to land in the Indian Territory."

The Commissioners informed the Indians that "the questions raised by some of the nations respecting the third and seventh propositions submitted by the Com-

missioners will receive proper consideration whenever a treaty is made with any nation affected by them.

The delegates for the Southern Cherokees (p. 339) said they accepted the first, second, fourth, fifth and seventh of the stipulations insisted upon by the United States Commissioners without qualification, and added:

> "We have accepted the abolition of slavery as a fact accomplished, and are willing to give such fact legal significance by appropriate acts of council, but we respectfully submit that it would neither be for the benefit of the emancipated negro, nor for the Indian to 'incorporate' the former into the several tribes on an equal footing with the original members. That the emancipated negro must be suitably provided for is a natural sequence of his emancipation, but so serious and delicate a question should not be so hastily considered and acted upon, and we therefore ask further time before deciding upon it, pledging ourselves to acquiesce in good faith in any plan which may be considered reasonable and just."

On September 15th the Creek delegations informed the commissioners (p. 341) as follows:

> "We are willing to provide for the abolition of slavery and settlement of the blacks who were among us at the breaking out of the rebellion, as slaves or otherwise, as citizens entitled to all the rights and privileges that we are."

The treaties made with the Five Civilized Tribes in 1866 counsel contend show that each and every one of the requirements in the treaty commission's instructions was met. John Ross made much trouble and was refused

recognition as chief. He remained recalcitrant and refused to sign the treaty, which was negotiated at Washington with some difficulty owing to obstacles raised by the Ross faction. The citations heretofore made from remarks of the other Indian delegations show clearly that when they realized they must provide for negroes the aim of the Indians was to limit the sharers to former slaves, and then to any other negroes who had been in the Indian country at the outbreak of the war and might return within a short time after peace to make his home in the Indian Territory, thereby preventing a general influx of negroes who might seek free land.

It must be borne in mind that lawful residence in the Indian Territory meant the right to occupy land; that the land was held in common by all members of each tribe; that the Cherokee laws and the treaties with the United States forbade any save members of the tribes and government officials to remain therein, and that the only right of occupancy any tribal member could have was by cultivation and control of improvements. The commission which negotiated the Cherokee treaty in reporting on it said officially:

> "Slavery is abolished and the full rights of the freedmen are acknowledged."

The Cherokee constitution was amended in strict accordance, even in words, to the treaty of 1866 and by Section 720 of the Cherokee Compiled Laws every person unlawfully residing or sojourning in the Cherokee Nation was declared an intruder, those lawfully there including only citizens and public employees.

Other sections of the Cherokee laws made provision

for complete annual lists to be reported from each district of all persons in the several districts in violation of law; for sale of intruders' effects and directed sheriffs to co-operate with the United States authorities in the removal of intruders. The official records of the Government show numerous calls in the early seventies on the United States to remove intruders.

The record in the instant case concedes plaintiffs in error ancestors were former Cherokee slaves; that the only question is whether they returned before February 11, 1867, or a little later, and that on this point there is conflict of testimony. Being former slaves, unless the ancestor expatriated herself, of which there is no allegation, Cherokee citizenship would seem clear. And so the Cherokees acknowledged for a long period after the treaty of 1866. The petition states plaintiffs in error and their ancestors long had been recognized as Cherokee freedmen and had lived among the Cherokees. There is no claim any attempt was made to deport Mary Robbins.

It was not until many years later the Cherokees, long after the Cherokee treaty of 1866 had been ratified and acted upon practically in accord with what seems its plain reading, sought to refine it away and abrogate it in effect. As official history shows, they executed it reluctantly, and in the Court of Claims denounced what was adjudged by the court to be its true meaning as an outrage on them by by the Government of the United States. In 1886 the Cherokee legislature, claiming the treaty of 1866 conferred civil but not property rights, passed what was known as the "Blood Bill," whereby they sought to exclude all but native Cherokees by blood from participation in a large payment of funds about to be made.

The result was to force the violation of the treaty of

1866 on the official attention of the United States. The view taken of the matter here under discussion by the Indian Office is shown in the subjoined letter of instructions from the Commissioner of Indian Affairs to the gentleman instructed to make what is known as the Wallace roll:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, July 11th, 1889.

John W. Wallace, Esq.,
Commissioner, etc.,
Washington, D. C.

By the Act of Congress approved October 19th, 1888 (25 Stat., 609), etc. * * * There are three classes of persons coming within the purview of said article (Art. IX, Treaty of 1866).

Those liberated by the voluntary act of their former owners or by law.

All free colored persons who were in the Cherokee country at the commencement of the rebellion or who returned within six months after the proclamation of the Treaty of 1866. Proclaimed August 11, 1866.

The descendants of the two classes named.

You will find the determination of the rights of colored persons under that article a very difficult one, owing in great measure to the then ignorance of these people and the imperfect data bearing upon the subject. There are many claimants whose rights are disputed and not recognized by the Cherokees.

* * * * *

Very respectfully,
T. J. MORGAN,
Commissioner.

It may be remarked the difficulties were vastly increased a dozen years later and immensely so if the governing principle as to all negroes was proof of physical return by Feb. 11, 1867, and not as Commissioner Morgan said, former slavery, as to the largest class.

Subsequently followed an Act of Congress conferring jurisdiction on the Court of Claims to determine whether the Cherokee Nation did have a lawful right under treaties to exclude the Delawares, the Shawnees, the freedmen (and later adopted or intermarried whites) from participation in the funds of the Cherokee Nation and the proceeds of sale of certain tribal lands. The Cherokees in an effort to revert, in a property sense, to their condition prior to 1866 when as a result of the drawn sword they were compelled to admit the freedmen and certain Indians and whites to a share in the tribal estate were contending that by the treaty civil rights only were conferred and that it was competent to exclude all but blood members from participation in tribal property. The contention on the other side, and the one that was successful, was that in the Cherokee Nation, whose constitution provided each Cherokee citizen should have an equal right in the whole national property, citizenship or civil rights and property rights were inseparable. Thus arose the case of Whitmire vs. The United States, reported in 31 Court Claims, 140. The record and the jurisdictional act show that the only point submitted to the court and the only issue before it and on which it had the advantage of testimony and of briefs and argument was whether or not the Cherokee freedmen as a class were entitled to share in the proceeds of the Cherokee outlet or strip lands west of the 96th meridian. The jurisdictional act, approved October 1, 1890 (26 Stat., 636), provided the court

should "hear and determine what are the just rights in law or in equity of the * * * Cherokee freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of Article 9 of the aforesaid treaty of 1866 in respect to the subject-matter herein provided for."

In an opinion in the case of Mary Ann Riley for enrolment, rendered August 31, 1905, by Assistant Attorney General Campbell and approved by the Acting Secretary of the Interior, the foregoing act and its jurisdictional effect was thus stated:

> "This was a jurisdiction to determine the rights in the common tribal property of the freedmen as a class, and neither in terms or by necessary implication did it extend to determination of what particular persons composed and constituted such class or who were freedmen."

As stated, an examination of the record in the case will show that what Assistant Attorney General Campbell has said was the court's jurisdiction was the only matter argued before it and hence that the point now involved has not had a *judicial* determination.

The attorneys for the Cherokee Nation in the Whitmire case in their brief on file in the Court of Claims practically admitted the true construction of the Treaty of 1866 to be what we are now contending for and on that theory advanced an argument that the treaty conferred only civil rights as distinguished from property rights. At page 15 of their brief, Messrs. Maxwell & Chase, attorneys for the Cherokee Nation, say:

> "By reference to the 9th article of the Treaty of

1866 it will be observed that all free colored persons who were in the Cherokee country at the commoncement of the rebellion and who were then residents therein or who might return within six months were given the same rights as the freedmen who had been liberated by their owners or by law. The Cherokee Nation was certainly under no obligation to provide for this class of persons, and this fact lends much force to the contention that the purpose was to confer upon the colored peope in the Cherokee Nation and all who might become residents therein such rights and such rights only as were conferred upon colored people in other parts of the United States."

The decree that was rendered by the Court of Claims will be found in the case of Whitmire, Trustee, vs. Cherokee Nation, 30 Ct. Clms., at pages 190 et seq. It will be found that the decree followed carefully the wording of Article IX, Treaty of 1866, saying in part:

"And it appearing to the court that under the provisions of Article IX of the Treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners, or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood."

It then found against the validity of the Cherokee Blood Bill of 1886, and after once more reciting the material provisions of Article IX, as above, held the Nation should account to the Cherokee freedmen for the Cherokee outlet millions and enjoined the Nation against discrimination against the freedmen, the decree adding (p. 193):

> "It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree" (under the Cherokee law all citizens, blood, negro or white, forfeited rights if they removed with their effects from the Cherokee Nation).

The Court then, by its decree, approved what is designated as the Wallace Cherokee freedmen roll and ordered the Secretary of the Interior to correct the Wallace roll by adding descendants and authorized the Secretary to appoint a commissioner to ascertain and report to him the facts "necessary for the correction of the aforesaid Wallace roll."

Subsequently by agreement of counsel for both parties this decree was vacated and a new decree dated Feb. 3, 1896 (see Whitmire case, 31 Ct. Clms., 140), entered under which what was known as the Kern-Clifton Cherokee freedmen roll on which appears the name of plaintiffs in error or their ancestors appears. This new decree followed the old decree so far as the designation of former slaves and free colored persons is conferred.

As stated by the Assistant Attorney General in an

opinion cited heretofore, neither the court's jurisdiction nor its decree attempted to determine the question here involved and, as the brief of the Cherokee attorneys quoted shows, the subsequent attempt to include the former slaves with the free negroes in the six months' clause was an afterthought and an attempt by the Cherokees to pick up some crumbs from the table of their defeat.

None of the citations from the report of the Southern Indian Treaty Commission was before the court, as the court record shows, and the numerous briefs filed disclose that the question was not an issue discussed before the court. Indeed, a paper bearing the endorsement of the court shows its own view was that it was the duty of the Secretary, and not of the court, to decide who were entitled to be classed as beneficiaries of Article 9 of the Treaty of 1866, and that it had no jurisdiction to decree as to other than the liability of the Cherokee Nation for attempting to evade its solemn treaty stipulations as contained in Article 9.

This paper, which is among the files of the Court of Claims, and is marked Exhibit A, shows that there was submitted to the court after the decree of February 3, 1896, the following (immaterial parts to present controversy omitted):

Exhibit A.

> "The court doth adjudge and decree that the commission provided for in its decree entered of record in the Court of Claims on February 3d, 1896, in the case of Moses Whitmire, Trustee, etc., vs. Cherokee Nation et al., being case No. 17,209, shall be governed by the following rules and directions in the discharge of the duties pre-

scribed for it in said decree, to wit:

First.

Second (the second relating to a proposition to invest the census officers with the Court of Claims authority).

Third.

Fourth.

Fifth. In making the investigation prescribed in said decree, it shall confine itself to the identity of the following classes of persons only: (1) All persons who had been held in bondage by any member of the Cherokee Nation and who had been liberated by act of law or by voluntary act of their owners and the descendants of such; (2) all free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 9, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty and their descendants; (3) all of the aforesaid classes who were citizens of the Cherokee Nation on May 3d, 1894.

* * * * *

Endorsement.

Respectfully referred to the Secretary of the Interior. The instructions to be given to the Commissioners must be determined by him. The within, proposed by counsel, seem unobjectionable to the court, except the second. But, with the approval of the Secretary, the court will appoint the Commissioners selected by him, Commissioners of this court, to take testimony, which will authorize them to administer oaths.

William A. Richardson,
Chief Justice.

February 15, 1896."

Three days later without so far as an examination of the docket and files discloses any argument or any representation of the Cherokee freedmen and apparently upon some ex parte presentation, Chief Justice Richardson wrote a letter to Commissioner Browning (31 Ct. Clms., 147) saying the six months limitation referred both to freedmen and free colored persons and that "freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree."

The plaintiffs in error nevertheless, or their ancestor, Mary Robbins, are on the roll prepared under this decree, the Kern-Clifton roll. When the division in severalty occurred under the acts from 1893 to 1907, the Cherokees vigorously assailed the claims of the freedmen to share in the distribution and by every means possible sought to prevent their enrollment. Their course is readily to be understood as they regarded the treaty of 1866 as an outrage forced on them, but the same feelings should not actuate the United States, though it has influenced action of some of its officials. They attacked the Kern-Clifton roll and at the same time alleged the Richardson letter of Feb. 18, 1896, was part of the decree and they so persuaded officials of the Interior department to whom the letter was shown in the printed reports while that of February 15 was suppressed. We contend the record cited shows that letter not entitled to any weight but an *ex parte* and *ultra vires* paper.

Counsel therefore insist that the decision of the Secretary of the Interior originally enrolling the plaintiffs in error was not only within the court's jurisdiction, but was as matter of fact and of law, correct. While we have cited the proceedings contemporaneous with and subse-

quent to the Cherokee treaty of 1866 to show that they are in accord with the reading at first sight of Article 9, it has been to negative any contention that article should not be construed according to its apparent import by itself. We believe the phraseology of the article such that the court, were the matter before it as an original proposition, would hold the language sufficiently clear to warrant issuance of the writ of mandamus against a public official who should refuse enrolment and allotment to one he admitted he found to be a Cherokee slave, but whom he rejected because, and solely because, the date of return to the Cherokee Nation was later in the year 1867 than February 11.

Roberts vs. Valentine, 176 U. S., 221.

But the case comes before this court not in that shape but the reverse, with the roll approved containing the names of plaintiffs in error and valuable rights conferred upon them, subsequent to which by a misconstruction of the terms of a treaty and then a different conclusion as to the facts with reference to the date of their return from that originally reached by the Secretary and from a like conclusion reached by the Kern-Clifton Commission it is sought to take away those rights. We submit a court would, even if the matter were open for its review by operation of the writ of mandamus by way of certiorari or appeal, which is not the office of mandamus, refuse to take away rights and would not construe the statutes and the treaty as the defendant in error contends.

The court below in its opinion states that the act of 1906 is a legislative declaration as to the Cherokee treaty of 1866. We submit that after rights had been acquired

under the treaty, lands had been improved on the faith of it and then those lands had been allotted to plaintiffs in error such a statute would be unconstitutional; that it is not retroactive, and that it is not a legislative declaration as to the true construction of the treay of 1866, but an attempt while preserving and recognizing the necessity of preserving vested acquired rights to limit future enrolment of former slaves.

The Act of 1906 Contains an Express Recognition That Rights Had Vested in Enrolled Allottees and Specifically Excepted Those Theretofore Enrolled from Disturbance by the New Rule Sought to be Laid Down as to Cherokee Freedmen.

When Congress in the act to wind up the affairs of the Five Civilized Tribes approved April 26, 1906, by paragraph two of section three, provided that the Cherokee freedmen roll should include former Cherokee slaves and their descendants only in the event they had actually returned and established residence in the Cherokee nation on or before Feb. 11, 1867, it added: "But this provision shall not prevent the enrolment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrolment by the Secretary of the Interior."

Counsel for plaintiffs in error, who are within this proviso, having been enrolled in 1904 and allotted and issued allotment certificates in 1905, contend that so far as they are concerned this was a plain inhibition on cancelation of enrolments previously made and evidences recognition of

the fact enrolment and allotment had conferred vested rights that it was beyond even Congress to disturb by legislation. At the time this legislation was passed, at the instance of some of the officials who were engaged on enrolment work, the Cherokee freedmen already enrolled numbered thousands and to a large extent they were already allotted. There were no restrictions on freedmen except as to the homestead of forty acres and they had parted largely with their surplus lands by deeds in fee. Many of these lands, surplus and homestead, contained valuable oil wells sunk on leases made by the allotted freedmen, frequently immediately after selection and prior to issuance of allotment certificates, as the law permitted. The Secretary had approved hundreds of these leases and assignments and reassignments had been made. Contracts and deeds with reference to the lands were valid from the date of allotment certificate and also from the date of selection, nine months before ripening of title to the allotment certificate, where no restrictions on alienation existed.

The Oklahoma Supreme Court has so held in McWilliams Investment Co. vs. Livingston, 98 Pac., 914; Godfrey vs. Iowa L. & T. Co., 95 Pac., 792.

The lands in numberless instances had passed into the hands of purchasers buying in good faith, with knowledge restrictions on the sale of the lands as the property of tribal members had been removed, and in reliance on the approval of enrolment by the Secretary and on the Government's records showing selection of the land allotted (in which event, of course, if the selector had lived and made improvements on the tract he had the right thereto), in some instances issuance of allotment certificates and in others of patents to those enrolled. All these

Hooks vs. Kennard, 25 Okla. 463 — "This court has held in several cases that the selection of + filing upon an allotment of land was the inception + beginning of the title of the allottee or his heirs + that when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title. If we apply that principle to the case at bar, the title to the allotments of the three Creeks whose estates are herein involved vested to and became vested in their heirs at the date said allotments were segregated and allotted in their names."

things were necessarily well known to the executive officers and to Congress or its committees. Congress was engaged in its mission of fitting the community for statehood. Severalty, the alienation and devolution of land and security of titles were essential to this mission. Also that the lands should be subject to taxation. The court below says the law-making power cannot be supposed to have meant by its proviso that those already enrolled should not be disturbed and their enrolments and allotments prevented from cancelation notwithstanding their slave ancestor had not returned by Feb. 11, 1867, because this would be an injustice by fixing a different rule for those so unfortunate as to have their cases decided subsequent to the act from those more fortunate in point of time of decision as to their right to enrolment. We respectfully submit far greater injustice would result and a frustration and impairment of the great primary purpose of Congress by the uprooting or possible uprooting of what had been decided and that Congress so recognized even while, as we contend, by its unwise and possibly unconstitutional legislation it was dealing unjustly by those former Cherokee slaves and their descendants on whom by treaty had been conferred valuable rights, and in the faith of which they had tilled and improved their patches of ground in the Cherokee Nation since war days. The Congress, we believe, acted hastily and on bad advice, but even the cupidity of those Cherokees wishing to possess the valuable oil territory of the freedmen did not blind them to the fact it would be dangerous to seek to disturb clearly vested rights. The cases where equity would act would be few and with full recognition of rights of purchasers and others.

Plaintiffs in Error are on the Kern-Clifton Roll. That Roll was Made Pursuant to a Court Decree. It was Expressly Recognized in the Curtis Act of 1898 and Enrollments Ordered in Strict Compliance with it. It Would be Manifest Error to Cancel an Enrollment Made of a Person on that Roll or the Doscendants of One.

The pleadings concede plaintiffs in error or their ancestor are on the Kern-Clifton roll and that they always have maintained their residence in the Cherokee Nation as required by Cherokee statute. If the Curtis act of 1898 be not wholly repealed as to enrolments by the Cherokee agreement of 1902, then the pleadings concede the roll, with the names of plaintiffs in error canceled, are not made in strict compliance with the decree of the Court of Claims because pursuant to that decree the Kern-Clifton roll was made. The case of plaintiffs in error is *res judicata*. The law and the facts have been once adjudicated by a proceeding to which plaintiffs in error, the Cherokee Nation and the United States were parties. The Court of Claims in the Whitmire case has recently passed a decree for the protection of rights secured by its decree and seeking to compel recognition of it by the Secretary. That case has been assigned by this Court for argument in January.

Plaintiffs in error contend their enrolment on the Kern-Clifton roll was conclusive as to their right on the Secretary's roll, and so as to their attempted cancelation. The Court of Claims decree if upheld may afford some protection to those on no rolls, but would not be adequate to meet the case of persons who like plaintiffs in error have been once enrolled and allotted. No lands are now

available for the unfortunates relying on the Court of Claims decree and the powers of that court. It may perchance result in their getting some money in lieu of lands. But by mandamus plaintiffs in error gain complete and adequate remedy because they will keep without inpairment their valuable lands to which they have been allotted and gain, without impediment, their proper share of tribal funds.

They submit the decree of the court below should be reversed with directions that the writ of mandamus against the defendant in error should issue as prayed.

Respectfully submitted,

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CHAS. J. KAPPLER,
JAMES K. JONES,
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Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES OF AMERICA EX REL. Lillie Lowe, Ransom Lowe, Bertha Lowe, Evalina Lowe, Mary Robbins, Albert Rogers, and Dollie Jones, heirs at law of Sherman Jones, deceased, plaintiffs in error, *v.* WALTER L. FISHER, SECRETARY OF THE INTERIOR.	No. 445.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case, like the Lucy Ann Turner case, argued and submitted herewith, is similar to the Goldsby and Allison cases (211 U. S., 249, 264), in that it is a proceeding by mandamus to compel the Secretary

of the Interior to restore the names of relators to the approved roll of freedmen members of the Cherokee Nation, they having been stricken therefrom by order of a former Secretary of the Interior March 4, 1907. But it differs radically from the Goldsby and Allison cases in that the relators were given notice and opportunity to be heard, the action complained of being taken in pursuance of evidence introduced at such a hearing, at which relators were actually heard in person or by counsel.

The petition alleged that relators were entitled to the benefits of certain treaties between the United States and the Cherokee Nation by virtue of the treaty of August 11, 1866 (14 Stat., 799), whereby former slaves of the Cherokee Nation, as they were advised, were granted all the rights of native Cherokees (R., 2, 3, par. 4); that prior to November 16, 1904, upon the application of the relators, and after a full and careful inquiry, the names of relators were duly ordered to be placed upon the final roll of freedmen citizens of the Cherokee Nation, and that thereafter, on November 16, 1904, the Acting Secretary of the Interior approved a final roll containing said names (R., 7, par. 7); that thereafter relators each selected an allotment of land within said nation and received an allotment certificate therefor, which are now held by them as conclusive evidence of their right to the land (R., 8, par. 8); that after issuance of said certificates, the then Secretary of the Interior arbitrarily and illegally undertook to deprive relators of their

rights by striking their names from said approved rolls (R., 9, par. 9); that the Secretary at that time conceded that relators were descendants of former Cherokee slaves who had been emancipated, but took the action he did upon the ground that said Cherokee slaves did not return to the Cherokee Nation prior to February 11, 1867, whereas in fact they did, although under no obligation so to do by the terms of the treaty proclaimed August 11, 1866 (R., 9, 10, par. 9); that the Secretary's action was induced by an erroneous construction of said treaty, whereby it was held that former slaves were obliged to return within the six months' period fixed for the return of free persons of color, and also by an usurpation of authority (R., 10, par. 9); wherefore they prayed that a writ of mandamus should issue requiring respondent to erase the notations upon said rolls showing the cancellation of their names, and to restore them to all rights and privileges as enrolled citizens or members of said nation (R., 11).

The respondent filed an answer in which it was admitted that the relators were descended from former Cherokee slaves, but denied that they were citizens of that nation. (R., 14, par. 1.) The answer also denied that relators were entitled to the benefits of the treaties referred to by them because Mary Rogers or Robbins, one of the relators and ancestor of the rest (the former Cherokee slave upon whose status that of all depended), was not a resident of said nation at the time of the proclama-

tion of the treaty proclaimed August 11, 1866, and did not return to said nation within the time prescribed by law. (R., 14, par. 4.) The answer admitted that on November 16, 1904, the Acting Secretary of the Interior approved a partial list of freedmen of said nation including the names of relators, on the report of the Commission to the Five Civilized Tribes to the effect that said Mary Robbins did return to the Cherokee Nation within the time specified in the decree rendered on February 3, 1896, by the Court of Claims in the case of *Moses Whitmire, trustee, etc.*, v. *The Cherokee Nation* (R., 15, par. 7), but alleged that later, when the complete record in the case of James Rogers, son of said Mary, was presented tending to show that said Mary did not " return " before February 11, 1867 (and this record was, " through oversight," not forwarded to the Secretary for consideration in the cases of Mary Robbins et al.; see petitioners' Exhibit A–1, R., 13), the Secretary remanded that case and ordered its rehearing in connection with the cases of the relators (R., 15–16, par. 9).

It was further alleged that after due notice to all the parties concerned and after a hearing in which all relators participated, either in person or by counsel or both (R., 16, par. 9), the Commissioner to the Five Civilized Tribes, December 3, 1906 (see respondent's Exhibit A, R., 18–20), found from the evidence that Mary Robbins, or Rogers, did not in point of fact return to said nation and establish an actual *bona fide* residence therein within the time

specified in the decree of the Court of Claims in the Whitmire case (R., 16, par. 9); that said commissioner further found that the other relators neither claimed nor possessed any right to enrollment other than as descendants of Mary Robbins, and that none of them could be identified on any roll of the Cherokee Nation except the Kern-Clifton roll (R., 16); that the commissioner therefore adjudged that relators were not entitled to enrollment, and that his judgment was affirmed by the Acting Secretary of the Interior, who ordered their names stricken from the rolls on March 4, 1907 (R., 17).

The answer further alleged that the action of respondent's predecessor in reopening and readjudicating the cases of relators was in accordance with his long-established practice (R., 17); that the matter sought to be controlled related to the allotment of land in severalty in the Cherokee Nation, and as such was committed originally to the exclusive jurisdiction of the Commission to the Five Civilized Tribes under the supervision of the Secretary of the Interior, and then exclusively to the said Secretary; and that the matter involved the exercise of judgment and discretion on the part of the Secretary, and the court had no jurisdiction thereof (R., 18, par. 11).

To this answer the relators demurred (R., 22), noting that the Secretary was without authority of law to cancel a name duly and regularly placed on the final approved rolls of the Cherokee Nation, and that relators, being former slaves, were not

required by the treaty of 1866 to return to said nation prior to February 11, 1867, and that failure so to return was no reason for cancellation of enrollment or failure to enroll (R., 23).

The District Supreme Court sustained the demurrer and ordered restoration of relators' names to the rolls. (R., 23–24.) This judgment was reversed by the Court of Appeals, and the cause remanded for further proceedings not inconsistent with its opinion. (R., 28, 34.)

Relators electing to stand upon their demurrer, judgment was entered by the Supreme Court in favor of respondent, with costs (R., 26–27), which final judgment was approved by the Court of Appeals (R. 34–35). Thereupon this writ of error was sued out.

ARGUMENT.

I.

The Secretary had authority to correct the rolls, upon notice and hearing to the party concerned, within the time fixed by law for their completion.

This case differs radically from the Goldsby and Allison cases (211 U. S., 249, 264), in that the action of the Secretary of the Interior in striking the names of relators from the citizenship rolls was taken after due notice and opportunity to be heard had been afforded them, the relators actually appearing in person or by counsel and being heard. (R., 16.)

The question presented and decided in the former cases was that the Secretary of the Interior had no authority to strike a name from an approved partial list of members of one of the Five Civilized Tribes *without* notice and hearing. (211 U. S., 263, 264.)

The decision in those cases manifestly proceeds upon the assumption that the Secretary might, upon notice and hearing, have taken the action complained of if the facts so determined warranted it. In this case, however, the relators contend that the Secretary had no authority to strike a name from an approved partial list of members of the Cherokee Nation, even upon notice and hearing, and although such action was taken within the time fixed by law for the completion of the rolls.

The act of July 1, 1902 (32 Stat., 716, 718, 720), relating to allotment of lands of the Cherokee Nation provided:

> SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.
>
> * * * * *
>
> SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee Tribe, upon which allotment of land and distribution of other tribal property shall be made. *When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete.* The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

The act of April 26, 1906 (34 Stat., 137), entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes," etc., contained the following provision:

> SEC. 2. * * * That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

It thus appears that by the act of July 1, 1902, the Cherokee rolls were not to be deemed complete until there had been "submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment," and that by the act of April 26, 1906, March 4, 1907, was fixed upon by Congress as the date upon which the rolls should be "fully completed," after which the Secretary of the Interior should have "no jurisdiction to approve the enrollment of any person."

These statutes do not undertake in any way to limit the authority of the Secretary to revise and correct the partial lists, at least prior to March 4, 1907, and as the answer of Secretary Garfield alleges, and the demurrer admits (R., 17)—

> the action of his predecessor, in reopening and readjudicating the cases of said relators, whose enrollment had been approved as aforesaid, and in striking their names from said approved partial list as aforesaid, was

> in accordance with his long-established and well-recognized practice, extending from the time the act of Congress of July 1, 1902 (34 Stat., 137), relating to the allotment of lands in the Cherokee Nation became operative until the close of March 4, 1907, the date fixed by the act of April 26, 1906 (34 Stat., 137), for the completion of the rolls of the Five Civilized Tribes, his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, having struck several hundred names from said approved rolls during that time, because they had been found to have been unlawfully or improperly enrolled.

Plainly, in view of the exclusive jurisdiction conferred by Congress upon the Commission to the Five Civilized Tribes, under the direction of the Secretary, in these allotment matters, and the fact that the action of the Secretary was in furtherance of the purpose of Congress in all of these allotment acts to secure correct lists of members of the Five Civilized Tribes and to protect the nations against fraud and wrong, no good reason exists why he should not be held to have the power, at least within the time fixed by Congress for the completion of the rolls, to strike any name from a partial list which, upon due investigation and after notice and hearing to the party concerned, had been found to be improperly placed thereon.

It will be observed that by the act of March 3, 1905 (33 Stat., 1060), the work of completing the

unfinished business of the Commission to the Five Civilized Tribes had been devolved upon the Secretary of the Interior, and that all the powers theretofore granted to the said Commission to the Five Civilized Tribes were thereby conferred upon the Secretary on or after July 1, 1905. The rehearing of this case, directed by the Secretary July 19, 1906, was had October 10 and 11, 1906 (R., 19), and the names of the relators stricken from the rolls on March 4, 1907.

The revisory and corrective power of the Secretary over the allotment of lands among the Five Civilized Tribes is similar to that exercised by the Commissoner of the General Land Office in respect to entries of the public lands, the extent of which was thus stated in *Cornelius* v. *Kessel* (128 U. S., 456, 461):

> The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary

> delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, *or without authority of law*. It can not be exercised so as to deprive any person of land *lawfully* entered and paid for.

So, in *Hawley* v. *Diller* (178 U. S., 476, 490), the court said:

> We are of the opinion that the result of the decisions of this court was correctly stated by Judge Hawley, when speaking for the United States Circuit Court of Appeals, in *American Mortgage Co.* v. *Hopper,* 29 U. S. App., 12, 17, he said: "(1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preemptioner his rights, where they have miscon-

> strued the law, or where any fraud or deception has been practiced which affected their judgment and decision."

This case is within the limitations expressed in these cases. The relators, after notice and hearing, have been found by the Secretary to have been improperly and unlawfully enrolled, and therefore have no valid claim to allotment or participation in the tribal funds. These facts, as pointed out by the Court of Appeals on the second appeal (R., 34, 35), distinguishes this case from *Ballinger* v. *Frost* (216 U. S., 246). There, the right of Mrs. Frost to enrollment and participation in the tribal property and funds was not questioned, and she had lawfully selected her allotment and received an allotment certificate therefor prior to the attempt of the Secretary to embrace it within a town site. Here, the Secretary has found that relators have no right to enrollment or participation in the tribal property or funds, and the tentative allotments made them was without authority of law.

Noble v. *Union River Logging Company* (147 U. S., 165), relied upon by relators, is not in point. There, upon the approval of the Secretary of the profile of the road, the grant of the right of way became operative by the terms of the act of March 3, 1875 (18 Stat., 482), and the matter therefore passed beyond his jurisdiction. Here, the mere approval of the enrollment of relators conferred no vested rights upon relators, at least prior to the time fixed for the completion of the rolls.

II.

Only Cherokee freedmen and their descendants who had complied with the provisions of the treaty of 1866, as to residence in the nation, were entitled to enrollment.

In view of the fact that, as above pointed out, exclusive jurisdiction was conferred by Congress upon the Secretary of the Interior in these allotment matters, it is not perceived how the correctness of his decision to the right of relators to be enrolled is subject to review by the courts. If he had authority, as the Government contends, within the time fixed by law for the completion of the rolls to revise and correct the same, after notice and hearing to the parties concerned, the courts have no jurisdiction to review his judgment.

It is submitted, however, that the decision of the Secretary that the relators were not entitled to be enrolled was correct. This decision was based upon the fact that Mary Rogers, or Robbins, the principal applicant, a former Cherokee slave, and the ancestor upon whose rights to enrollment the other relators depended, had not returned to and established her residence in the Cherokee Nation "within the time specified in the decree of the Court of Claims rendered February 3, 1896, in the case of *Moses Whitmire, trustee, etc.*, v. *The Cherokee Nation et al.*, as provided by paragraph 2 of section 3 of the act of Congress approved April 26, 1906 (34 Stat., 137), for the return of freedmen to said nation." (R., 16.)

It is contended that the provisions of Article IX of the treaty of August 11, 1866 (14 Stat., 799, 801), in regard to the Cherokee freedmen, do not warrant the construction placed upon it by the Court of Claims in the *Whitmire* case, and that that court had no jurisdiction to decide that question. We respectfully submit that that construction was correct, and that the court had jurisdiction. The treaty provided:

> ARTICLE IX. The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. *They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided,* That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.

The contention is that the words in the second sentence of the above paragraph, "and are now

residents therein, or who may return within six months," modify only the words " as well as all free colored persons who were in the country at the commencement of the rebellion," and do not apply to the freedmen. It will be observed, however, that such construction would operate to confer upon freedmen, whether resident in the nation or not, " the rights of native Cherokees," something that Congress plainly could not have intended, and further that if the provisions as to residence and return do not apply to the freedmen, the phrase " and their descendants " can not grammatically be held to apply. The punctuation, by which the provision as to free colored persons is separated both from the preceding and succeeding phrases by commas, implies that the provisions as to residence and return as well as to descendants was intended to modify both the provisions as to freedmen as well as that to free colored persons. It is manifest that Congress could not have had any intention to confer upon freedmen not residents of the nation the rights of native Cherokees.

This was the construction placed by the Court of Claims upon the language of the treaty in the Whitmire case, the court saying (31 C. C., 148):

> The court is of the opinion that the clauses in that article in these words, "*And are now residents therein, or who may return within six months, and their descendants,*" were intended, for the protection of the Cherokee Nation, as a limitation upon the number of

> persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

That the Court of Claims had jurisdiction to determine this matter appears from the jurisdictional act of October 1, 1890 (26 Stat., 636), set out in *Journeycake* v. *Cherokee Nation* (28 C. C., 281, 282). That act is entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes." Its first section provides:

> *Be it enacted, etc.*, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, * * * and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject matter herein provided for.

That Congress itself construed Article IX of the treaty of August 11, 1866, as conferring the rights of native Cherokees only upon Cherokee freedmen residents of the nation, or who had returned thereto as provided therein, appears from the act of October 19, 1888 (25 Stat., 608, 609), referred to by the Court of Claims in the case of *Whitmire, trustee,* v. *Cherokee Nation* (30 C. C., 180, 182), under authority of which what is known as the Wallace roll of Cherokee freedmen was made. That act is entitled "An act to secure to the Cherokee freedmen and others their proportion of certain proceeds of lands, under the act of March 3, 1883." Its first paragraph recites the language of ninth article of the treaty of August 11, 1866, with reference to freedmen and free colored persons. After further recitals the act appropriates a certain sum of money to be expended in carrying out its provisions, and provides that—

> The said sum, or so much thereof as may be necessary, shall be by the Secretary of the Interior distributed per capita, first, among *such* freedmen and their descendants as are mentioned in the ninth article of the treaty of July nineteenth, eighteen hundred and sixty-six, between the United States and the Cherokee Nation of Indians, etc.

This language shows that Congress understood that the ninth article of the treaty did not refer to all Cherokee freedmen, whether residents of the

nation or not, but only to those who were residents therein or had returned thereto within the time fixed by the treaty. It is to be observed that the names of relators did not appear upon the Wallace roll made in pursuance of the act just referred to (R., 16), and that their enrollment upon the Kern-Clifton roll was contrary to the express instructions of the Court of Claims in the Whitmire case.

As pointed out by the Court of Appeals, in its opinion in this case, "if any doubt theretofore existed as to the proper construction to be given Article IX of said treaty of August 11, 1866, that doubt was dissipated by the language of section 3 of the above act of April 26, 1906, for that language constitutes a legislative interpretation of, and supersedes *pro tanto*, the prior treaty. *The Cherokee Tobacco*, 11 Wall., 616." (R., 32.)

The provision of the act of April 26, 1906, referred to by the court reads (34 Stat., 138):

> The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the en-

> rollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

The relators claim that the proviso to this provision operated to prevent the Secretary from striking their names from the rolls because Mary Robbins had not returned to the nation as provided therein. As pointed out by the Court of Appeals (R., 33, 34), in order to avoid arbitrary action and injustice on the part of Congress, this proviso should be construed to have reference to the final adjudication by the Secretary, within the time fixed by law for the completion of the rolls, of the right of a person to remain thereon. As above indicated, the treaty of 1866 had been construed both by Congress and the Court of Claims to authorize the enrollment only of freedmen who came within its provisions as to residence in the nation. It is manifest, therefore, that a construction which would result in the enrollment, and consequent participation in the lands and funds of the nation, of persons who had no claim to such benefits under any law or treaty should be avoided. Certainly the courts should not lend their aid by the extraordinary writ of mandamus to the perpetuation of injustice upon the nation.

It will be also observed that the proviso in question does not undertake to require the enrollment

of any freedman whose rights to enrollment had been previously adjudicated, but the language is that the act of April 26, 1906, shall not operate to "prevent" his enrollment. Clearly, Congress could not have intended to *compel* the enrollment or the maintenance on the rolls of any person, although he had been found by the Secretary, within the time fixed by that act for the completion of the rolls, to have been unlawfully enrolled. The act does not undertake to deprive the Secretary of any revisory power over the rolls which he possessed and had customarily exercised. The Cherokee Nation is entitled to protection against unjust and arbitrary action which would deprive it in *pro tanto* of its property, and certainly the courts, now that the want of authority to enroll relators has been shown, will not exert themselves to perpetuate a wrong upon the nation.

As pointed out in the brief for defendant in error in the Lucy Ann Turner case, No. 60 of this term, submitted herewith, the writ of mandamus is not a writ of right and will not be granted to perpetuate rights wrongfully obtained or to perpetuate fraud or injustice. In securing enrollment in the first instance, in the face of the provision of the treaty of 1866, as construed by the Court of Claims, as to the residence of Cherokee freedmen in the nation, it would seem that relators were practically guilty of constructive fraud. At any rate, they are

in no position to ask the aid of the courts to perpetuate the wrong and injustice to the nation thus occasioned.

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

NOVEMBER, 1911.

○

UNITED STATES EX REL. LOWE *v.* FISHER, SECRETARY OF THE INTERIOR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 445. Argued November 14, 1911.—Decided January 29, 1912.

Where the Court of Claims has kept control of a case referred to it by act of Congress giving it jurisdiction as to all questions, its reply made to the request of the officer of the Government charged with execution of its judgment for further opinion is to be regarded as part of the decision.

The limitations on the right to return to the tribe in Art. IX of the Cherokee Treaty of August 11, 1866, refer to both freedmen and free colored persons; and freedmen and descendants of freedmen who did not return within six months are excluded from the benefit of the treaty.

Notwithstanding a decree of the Court of Claims determining the rights of Indians in a case over which Congress gave the court jurisdiction, it is competent for Congress to deal further with the subject. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Wallace* v. *Adams*, 204 U. S. 415.

Quære: Whether a roll of citizenship of an Indian tribe, made under

direction of the Court of Claims, has the conclusive effect of a judicial decree.

Under the acts of Congress of 1902 and 1906 in regard thereto, the enrollment of freedmen of the Cherokee tribe was to be made in strict conformity with the decree of the Court of Claims, and should include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence within six months thereafter.

While the Secretary of the Interior did not have power to strike names from the roll of Cherokee citizens without notice and opportunity to be heard, he did have power, after such notice and opportunity had been given, to strike from the roll names which had been placed thereon through fraud or mistake. *Garfield* v. *Goldsby*, 211 U. S. 249.

35 App. D. C. 524, affirmed.

THE facts, which involve the construction of the various treaties, acts of Congress and decisions of the Court of Claims in regard to the rights of Cherokee freedmen and their descendants to share in the distribution of tribal property, are stated in this opinion.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler*, *Mr. J. K. Jones* and *Mr. Frank E. Duncan* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Harr for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case involves the question whether the Secretary of the Interior, after due hearing and after having made up a roll of citizens of the Five Civilized Tribes of Indians and after having issued certificates of allotment to the enrolled Indians, may strike their names from the roll after

giving due notice of his intended action and an opportunity to be heard.

The case arose upon the exercise of such power by the Secretary and an action of mandamus to require him to cancel his action. To the answer of the Secretary the Supreme Court of the District of Columbia sustained a demurrer and entered a judgment in accordance with the prayer of the petition. The Court of Appeals reversed the judgment. On return of the case to the Supreme Court the relators elected to stand on their demurrer and the court dismissed their petition. This action was affirmed by the Court of Appeals and the case was then brought here.

It was decided in *Garfield* v. *Goldsby*, 211 U. S. 249, that the Secretary had no such power without notice to the parties concerned and an opportunity to be heard. These conditions were performed in the present case, and, so far, the case is distinguished from the *Goldsby Case*. The power of the Secretary upon the rehearing under the applicable statutes is now to be considered.

The relators base their right of enrollment on Article IX of the Cherokee treaty of August 11, 1866 (14 Stat. 799), the material part of which is as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now resident therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." It was found by the Secretary of the Interior that relators were descendants of liberated slaves, but he also found that their ancestors had not returned to the Cherokee Nation within six months of the date of the treaty, August 11, 1866. This must be assumed to be the fact, for it is alleged in the answer and admitted by the demurrer. Two propositions of law are, however, urged

by relators: (1) that the requirement of a return within the time designated applies only to free colored persons; and (2) that the Secretary having, on November 16, 1904, approved a list of Cherokee freedmen, containing the names of relators, on the ground that their ancestors had complied with the provision for return to the Nation, had no power to cancel their names.

(1) Article IX of the treaty is undoubtedly ambiguous, and to support their construction of it relators trace its genesis to the compulsion exercised on the Cherokee Nation by the United States for its espousal of the cause of the Confederacy during the Civil War. The Indians, it is said, were regarded as having forfeited their treaty rights, but the United States were willing to renew relations with them, stipulating, among other things, that "the institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for."

The Indians resisted the conditions, and replied that it would not be for the benefit of the emancipated negro, nor for the Indians, to incorporate the former into the several tribes on an equal footing with the original members. They conceded, however, that the emancipated negro must be suitably provided for, and subsequently the Choctaws suggested that white persons should be excluded from their Territory, and that "no person of African descent, except our former slaves, or free persons of color who are now, or have been, residents of the Territory, will be permitted to reside in the Territory, unless formerly incorporated with some tribe, according to the usage of the band."

The Seminoles answered to the same effect, and asked that Article III be changed to admit only colored persons

lately held in bondage by them and free persons of color residing in the Nation previous to the rebellion, to a residence among them, and adoption in the Seminole tribe upon some plan to be agreed upon by them and approved by the Government. "We are willing," they said, "to provide for the colored people of our own Nation, but do not desire our lands to become colonization grounds for the negroes of other States and Territories." The Creeks expressed this in the same way, and the relators further adduce, as supporting their construction of Article IX, that the commission which negotiated the treaty, reporting on it officially, said: "Slavery is abolished and the full rights of the freedmen are acknowledged."

The history of Article IX, therefore, it is insisted, shows that the article consummated the purpose. In other words, when the Indians realized that they must provide for negroes, they limited their concession "to former slaves and then to any other negroes who had been in the Indian country at the outbreak of the war and might return within a short time after peace to make their home in the Indian Territory, thereby preventing a general influx of negroes who might seek free land." And the right to land, it is pointed out, was the consequence to be apprehended, as "lawful residence in the Indian Territory meant the right to occupy land."

It is further contended that the Cherokees acted upon the treaty practically in accordance with this construction of it, and that it was not until many years after that they "sought to refine it away and abrogate it in effect." They accepted it reluctantly, it is said, and subsequently contended that it conferred civil, not property, rights and passed what was known as the "Blood Bill," by which they sought to exclude all but native Cherokees by blood from participation in a large payment of funds which was about to be made. This gave rise to controversy, and Congress passed an act conferring jurisdiction on the

Court of Claims to settle the matter. The act is entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes." It was approved October 1, 1890 (26 Stat. 636, c. 1249). The Cherokee freedmen whose rights were to be determined under the act were those who "settled and located in the Cherokee Nation under the provisions and stipulations of article nine" of the treaty.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens equally with the Cherokees and equally interested in the common property and equally entitled to share in its proceeds *per capita*. But the court did not attempt an analysis of § 5 of the constitution nor of Article IX of the treaty (they are alike) but defined the rights of the freedmen and the free negroes in the language of the constitution and the article. 31 Court of Claims, 140. The opinion in the case, therefore, as delivered, had the same ambiguity as the constitution and treaty and was not understood by the Commissioner of Indian Affairs, who was charged by the Secretary of the Interior with the duty of determining who were the resident freedmen entitled to share in the disposition of the fund as decreed and who desired the further opinion of the court. In reply, the court said (31 Ct. Cl. 148):

"The court is of the opinion that the clauses in that article in these words, '*And are now residents therein, or who may return within six months, and their descendants,*' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree."

Subsequently the court was called upon to add to its opinion, which it did, as follows: "The court is of the opinion that the *Act 2d March, 1895* (28 Stat. L., p. 910, § 11), prescribes the manner in which payments per capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior. The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs February 18, 1896.

"The within motion for instructions is overruled." 31 Court of Claims, 140, 148.

The relators contend that the reply of the court to the Commissioner was not part of its decision. This, however, is a mistake. The court had kept control of the case, and at the time of its reply to the Commissioner the case was pending upon certain motions made by the parties. And, as we have seen, the court had been given special jurisdiction of the question and all others which were involved in the controversy. But it is contended that the only issue submitted to the court was whether "the Cherokee freedmen, as a class, were entitled to share in the proceeds of the Cherokee outlet or strip lands west of the 90th meridian." It is, hence, further contended that the jurisdictional act did not extend to the determination of what particular persons composed such class or who were freedmen, and that, therefore, "the point now involved has not had judicial determination."

The object of the contention, no doubt, is to clear the way for the ultimate contention upon which their case must rest, the want of power of the Secretary of the Interior over rolls which he had once approved and after having issued certificates of allotment to the enrolled Indians. In other words, relators would push aside the adjudication of their disqualification to be enrolled, they not having returned to the Cherokee Nation within the time designated by the treaty. They, however, make

an alternative contention and urge that they were adjudged to be within the provisions of the treaty by their enrollment upon the Kern-Clifton roll, which they insist was adjudged to be legal evidence of the rights of the freedmen; in other words, that the enrollment identified the individual freedmen who were entitled to participate in the tribal property.

It is admitted in the answer that relators are on the Kern-Clifton roll, and it does not seem to be contested that the roll was made under instructions from the Court of Claims. A plausible argument, therefore, is presented that it partakes of the conclusive effect to be attributed to a judicial decree. And it is further urged by relators that the Kern-Clifton roll was confirmed by the act of June 10, 1896 (29 Stat. 321, 329, c. 398), which declared "that the rolls of citizenship of the several tribes as now existing are hereby confirmed."

What effect we should have to give to the decree, assuming it to go as far as contended, we are not called upon to say. It was certainly competent for Congress further to deal with the subject. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Wallace* v. *Adams*, 204 U. S. 415.

We pass, therefore, to a consideration of the act of June 10, 1896, upon which relators rely. It was one of a number of acts which exhibit a connected scheme for the enrollment of the members of the Five Civilized Tribes and the division of their tribal property, although their provisions are somewhat varying.

By the act of March 3, 1893 (§ 16, 27 Stat. 645), the Dawes Commission was created, with powers to negotiate with the tribes. In 1896, by the act of June 10th of that year (29 Stat. 321, c. 398), the Commission was directed to make up a roll of the citizens of the tribes, which included the Cherokees, who should apply within three months from the passage of the act, and to decide all such applications within ninety days after the same should be

made. Due force and effect was directed to be given to tribal rolls, usages, customs and laws, if not inconsistent with Federal laws. The act contained the provision which we have already quoted, that is, "that the rolls of citizenship of the several tribes as now existing are hereby confirmed." There were powers of review given to those aggrieved by the decision either of the Commission or the tribal authorities. The relators, however, say that "the Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the rights of persons to be on the tribal rolls, and the controversy which ensued continued, and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time."

But before that final date arrived Congress passed several acts, the provisions of which are relied on by relators as establishing their right. The acts would seem to demonstrate the contrary, and that the conditions which arose demanded changes in legislation. It is true that it is provided that the rolls of the tribes which were directed to be made, when approved by the Secretary of the Interior, should be final and should constitute the several tribes which they represented; and it is therefore contended that those provisions became legislative confirmations which the Secretary was without power to disregard, and that every partial list forwarded to him which he approved he could not afterwards change, whatever the proof of mistake, imposition or fraud. A few citations will prove the unsoundness of the contention.

The act of June 10, 1896, *supra*, which is so much relied on, was largely superseded by § 21 of the act of June 28, 1898, commonly known as the Curtis Act. 30 Stat. 495, 502, c. 517. The section gave the Commission the power to investigate the right of persons whose names were on the rolls and to "omit all such as may have been placed there by fraud or without authority of law, enrolling only such

as may have lawful right thereto," etc. And it was provided that the Commission "shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six." It was further provided that the Commission should "take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress. . . ."

It is manifest from this act that the contention of relators that the tribal rolls were to be treated or accepted as absolutely confirmed is unsound. One roll only was confirmed. The other rolls were to be corrected, not confirmed; and a roll of the Cherokee freedmen was to be made in conformity with the decree of the Court of Claims—a roll not confirmed, but to be made, so as to exclude the relators because they were excluded by the decree; that is, because they were not residents of the Cherokee Nation at the time of the promulgation of the treaty.

It does not appear that relators were on any roll prior to the passage of the act of June 10, 1896, upon which they so much rely, and therefore within its confirmatory provision, giving it all the force contended for. They were on the Kern-Clifton roll, it is said, but when that roll was made does not appear. The allegation of the petition is that prior to November 16, 1904, the Secretary of the Interior affirmed a decision by the Commissioner of the Five Civilized Tribes which held that relators were entitled to enrollment as citizens, and that prior to that date they were regularly ordered to be placed upon the final roll of freedmen citizens, and that such roll was duly and regularly approved by the Secretary of the Interior on the sixteenth of November, 1906.

But the act of July 1, 1902 (32 Stat. 716, 720, § 27), emphasized the requirement that the enrollment of freedmen

must be made in strict conformity with the decree of the Court of Claims. Congress was even more particular in the act of April 26, 1906 (34 Stat. 137). Section 3 of the act explicitly provided that "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal *bona fide* residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven."

Relators nevertheless insist that notwithstanding they were not entitled to be placed upon the rolls, yet, having been placed there, they cannot be taken off by the Secretary of the Interior; citing in support of the contention certain provisions of the acts of Congress and the congressional policy expressed in them. The policy of the Government, it is said, was to expedite enrollment, with the view to the distribution of the tribal property and the preparation of the Indian Territory for statehood. To these ends the acts of May 31, 1900, 31 Stat. 221, c. 598, and March 3, 1901 (31 Stat. 1073, c. 832), endeavored to speed enrollment matters by directing the Secretary of the Interior to fix a time for closing the rolls, after which no name should be added thereto. Then came the act of July 1, 1902 (32 Stat. 716, c. 1375), which, it is insisted, practically repealed prior acts so far as they concerned enrollments. Such prior acts, it is said, "made approval of enrollments depend upon the completion of the rolls of an entire tribe, and the Secretary's approval under it would await the finishing of enrollments of an entire tribe." And until such time "there would be no allotment to any tribal member." The Secretary's control, hence, continued "until the last," and the congressional policy was likewise postponed. But, it is argued, contrasting the

new measures with the old, under the act of 1902 "enrollment and allotment went hand in hand." This contention is rested on § 29 of the act, which directs lists to be prepared of those found by the Commission to be entitled to enrollment; and, it is provided, that "the lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of their property shall be made;" and, further, that "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete."

A roll made complete, it is argued, by legislation excludes the idea of correction by an executive officer; and, besides, it is urged that the certificates of allotment carry with them the sanction of the law's declaration that they shall be "conclusive evidence" of the rights of the allottee. Physical possession of the lands described in them is to be given, it is pointed out, and, describing the conditions which were created and which would be disturbed by an exercise of power to recall them, it is said that "from the date of selection of their allotments under the law, allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes." And, further, that "allottees also, from the same date, created town sites where practicable, and sold town lots, with their title resting in their allotment selections or certificates," and that such transactions have been declared valid by the Supreme Court of Oklahoma, citing *McWilliams Investment Co.* v. *Livingston*, 98 Pac. Rep. 914; *Godfrey* v. *Iowa L. & T. Co.*, 95 Pac. Rep. 792.

We recognize the strength of the considerations urged, but it certainly did not militate against the congressional policy of the allotment of lands to retain in the Secretary of the Interior the power of revision and correction until

the final moment when jurisdiction was expressly taken from him, as provided in § 2 of the act of April 26, 1906 (34 Stat. 137, c. 1876), that is, the fourth day of March, 1907. That Congress could give such power to the Secretary of the Interior is settled. *Stephens* v. *Cherokee Nation* and *Wallace* v. *Adams, supra.* In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat attempts at fraud. We have seen what power the Dawes Commission was given to investigate the rights of persons whose names were on the rolls, and, as to freedmen, strict compliance with the decree of the Court of Claims was enjoined. By the act of March 3, 1905, 33 Stat. 1048, 1060, c. 1479, the work of completing the unfinished business of the Commission was devolved upon the Secretary of the Interior and all of the powers theretofore granted to the Commission were conferred upon the Secretary. It was subsequent to this act that action was taken as to relators and their names stricken from the rolls. This revisory and corrective power of the Secretary over the allotment of land is similar to that exercised by the Land Department respecting the entries upon public lands, which this court has stated to be correct and annul entries of land which were made upon false testimony and without authority of law. *Cornelius* v. *Kessel,* 128 U. S. 456, 461; *Hawley* v. *Diller,* 178 U. S. 476, 490.

Judgment affirmed.

END

OF

CASE